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In The Supreme Court of the United States

OCTOBER TERM, 1978

79-81

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

REPUBLIC STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Thomas E. Coffy,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–2a) is reported at 85 Lab. Cas. (CCH) ¶11,012. The court's order is reported at 590 F.2d 334. The opinion of the district court following remand (App. B, *infra*, 3a–11a) is reported at 461 F. Supp. 344. The first opin-

[1]The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

ion of the court of appeals (App. C, *infra*, 12a) is unofficially reported at 82 Lab. Cas. ¶10,071. The first opinion of the district court (App. D, *infra*, 13a–30a) is unofficially reported at 77 Lab. Cas. ¶11,158.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1978, and a petition for rehearing was denied on February 16, 1979 (App. E, *infra*). On May 9, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 15, 1979, and on June 6, 1979, Mr. Justice Stewart further extended the time to and including July 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether supplemental unemployment benefits provided in the steel industry collective bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 2021 provides in pertinent part:

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing

> after discharge for a period of not more than one year—
>
> * * * * *
>
> (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay * * *.
>
> * * * * *
>
> (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.
>
> (2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in [his] employment as [he] would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

STATEMENT

1. Petitioner was employed by respondent as a crane operator for about four months in 1968, and again from January 24, 1969, until he left to enter military service on September 9, 1969. He served in the military until August 16, 1971, when he was honorably discharged (App. D, *infra*, 19a).

Petitioner timely applied for reinstatement to his previous position on September 14, 1971. Petitioner was reinstated, but because he would have been laid off by that date had he remained continuously employed with respondent, he was immediately placed in a layoff status. Petitioner was subsequently recalled to work on July 1, 1972. During the period of layoff, petitioner received supplemental unemployment benefits (SUB) from respondent for 25 weeks (App. D, *infra*, 19a–20a).

The supplemental unemployment benefits plan, created by the collective bargaining agreement between the major steel companies (including respondent) and the United Steelworkers of America, provides weekly payments to employees laid off from work. The benefits supplement unemployment compensation to which the employee is entitled under state law. The length of time during which an employee receives SUB benefits while on layoff is determined by the number of credit units he has accumulated prior to layoff. Under the plan, an employee accrues one half credit for each week in which he has any of the following hours:

> a. hours worked for the company;
>
> b. hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance;
>
> c. hours not worked and not paid for but which were lost because:
>
> (1) he was performing his duties as a local union officer; or

> (2) he was absent because of disability for which benefits are payable under a workmen's compensation or occupational disease law, or under the company program of insurance benefits.

A maximum of 52 credit units may be accrued by an employee at any one time. He uses one credit unit for each week he is paid supplemental unemployment benefits (App. D, *infra*, 18a).

The SUB plan also provides (App. D, *infra*, 17a–18a):

> If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purpose of the Plan to be on leave of absence and shall not be entitled to any Benefit.
>
> Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may be otherwise required by law.

Thus, under the plan, upon his reemployment after military service petitioner was credited with the 25 credit units he had accumulated prior to his entering military service, but he was not accorded any additional credit units for the period he spent in military service. The parties agreed that if petitioner had not entered military service, he would have accumulated the maximum of 52 credit units and thus would have received SUB benefits for the entire nine and a half months he was on layoff status (App. D, *infra*, 20a).

2. Petitioner filed suit in the United States District Court for the Northern District of Ohio, alleging that respondent violated the veterans' reemployment provisions of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. 2021 *et seq.*, by refusing to consider his military service time in computing the amount of SUB credit units he had accumulated. Petitioner al-

leged that supplemental unemployment benefits are a "perquisite of seniority" (*Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 230 (1966)) under the Act since they represent protection against economic loss in much the same way as seniority. Thus, he claimed that upon his return to his civilian employment, his amount of SUB credit units should have been computed "as * * * if [he] had continued in such employment continuously from the time of [his] entering the Armed Forces until the time of [his] restoration to such employment" (38 U.S.C. 2021(b)(2)).

The district court, relying on *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), entered summary judgment for respondent, holding that the SUB credits were accumulated based on a " 'work requirement that constitutes a bona fide effort to compensate for work actually performed' " (App. D, *infra*, 23a). While the case was pending on petitioner's appeal to the Sixth Circuit, this Court decided *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), holding that pension benefits are a perquisite of seniority under the Act and thus that the time spent in military service must be credited toward an employee's benefits. The court of appeals sua sponte vacated the district court's judgment and remanded the case for reconsideration in light of *Alabama Power* (App. C, *infra*, 12a).

On remand, the district court reaffirmed its original decision that SUB credits are not seniority rights entitled to the Act's protection. It reiterated that "SUB benefits are 'in the nature of short term compensation for services rendered' and 'not an aspect of seniority within the coverage of' " the Act and that "entitlement to SUB benefits 'require[s] more than continued status, such as a work requirement demanding actual performance on the job' " (App. B, *infra*, 7a–8a).

The court of appeals affirmed "for the reasons set forth in [the] second opinion for the district court" (App. A, *infra*, 2a).

REASONS FOR GRANTING THE PETITION

1. As the court of appeals apparently recognized (see App. A, *infra*, 2a), its decision is in conflict with *Hoffman* v. *Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973),[2] and *Akers* v. *General Motors Corp.*, 501 F.2d 1042 (7th Cir. 1974). In those cases, the Third and Seventh Circuits held that supplemental unemployment benefits are perquisites of seniority and thus that the returning veteran is entitled to SUB payments based on the credits he would have accumulated but for his absence in military service.

Approximately 1,700,000 employees are covered by collective bargaining agreements that provide supplemental unemployment benefits. This figure includes approximately 390,000 employees in the primary and fabricated metals industry, 745,000 employees in the automobile industry, 156,000 employees in the nonelectrical machinery manufacturing industry, and 123,000 employees in the apparel industry. See U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 2013, *Characteristics of Major Collective Bargaining Agreements* 79 (Feb. 1979). There are no readily available statistics to show how many of these employees are (or might become) returning veterans whose benefits would be truncated by the decision below or others that may follow it. What is certain, however, is that, unless this Court resolves the conflict among the circuits, veterans who work in the same industry under the same collective bargaining agreement—indeed, even for the same employer—will find that their entitlement to full SUB credits and the substantial protection against economic injury they afford depends upon the circuit in which their plant is located.[3]

---

[2]See also *Foster* v. *Dravo Corp.*, 490 F.2d 55 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975).

[3]The Third, Sixth and Seventh Circuits house the heaviest concentration of plants within the steel industry.

2. In addition to creating a conflict among the circuits, the court of appeals' decision is wrong. As the Court recently explained in *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 589, there is a two-fold test "for determining whether a benefit is a right of seniority secured to a veteran by" the Act. Under this test, a fringe benefit is a right of seniority if (1) it would have accrued with "reasonable certainty" had the veteran been continuously employed with his private employer instead of entering military service, and (2) it is, by its "real nature," a reward for length of service rather than short-term compensation for services rendered.

The first aspect of the test is met here, for the parties agreed that petitioner would have accrued the maximum of 52 SUB credits by the time of his layoff if he had not entered military service (App. D, *infra*, 20a). Moreover, supplemental unemployment benefits are, by their "real nature," inducements to, and rewards for, long service. As the Third Circuit stated in *Foster* v. *Dravo Corp.*, 490 F.2d 55, 59 (1973), aff'd, 420 U.S. 92 (1975), in explaining its decision in *Hoffman* v. *Bethlehem Steel Corp.*, *supra:*

> Unlike vacation benefits, the protection which the SUB plan furnishes is part of an employee's job security interest. The SUB plan is designed to and in fact does give the employee assurance that throughout his employment he not only earns his take home pay, but also accumulates assurance that, if exigencies of business require that he be laid off, he will have income for some period of time. The plan is a way of conferring, in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment. The SUB plan thus has as its purpose and effect the extension of a seniority-type protection to employees who, due to their relatively short length of service with the company, would formerly have been unprotected. Therefore, [38 U.S.C. 2021], interpreted in the light of its overall purpose and applied to give effect to evolving practice in labor relations, can fairly be said to require that the returning veteran be accorded this seniority-type advantage.

See also *Akers* v. *General Motors Corp.*, *supra*, 501 F.2d at 1045 n.11; *Thornhill* v. *Ormet Corp.*, 84 Lab. Cas. ¶10,786 (S.D. Ohio 1978).

Respondent counted petitioner's time in military service toward the two-year SUB eligibility period (as indeed it was required to do since that two-year period is manifestly a seniority requirement (see *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 593)), yet it refused to give him any SUB credits beyond those he had earned by the day he left respondent's employ to join the military. This anomalous treatment of petitioner's military service is unjustified; it treats military service as "time on the job" for one SUB purpose but not another. Moreover, SUB satisfies the same needs of the employers that pensions do, albeit on a smaller scale. It encourages retention on the job rolls of the most senior employees on layoff and thus "reduce[s] * * * turnover and training costs and help[s] an employer secure the benefits of a stable work force." *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 594.

Furthermore, SUB payments are not awarded pro rata; an employer who is laid off just prior to his second anniversary receives nothing, while an employee laid off just afterwards receives the maximum benefit. And the amount of benefits is largely calculated on the size of the employee's family, a factor wholly unrelated to the work done. See *Thornhill* v. *Ormet Corp.*, *supra*, 84 Lab. Cas. at 19,018.

The district court below, upon whose decision the court of appeals relied, did not analyze these functions of SUB payments "in the employment system" (*Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 594). Instead, it reaffirmed its previous approach that the existence of a bona fide or substantial work requirement automatically eliminates a benefit from the Act's

protection. But as this Court observed in *Alabama Power* (431 U.S. at 592), "[e]ven the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee. * * * We must look beyond [this] overly simplistic analysis * * * to the nature of the payments."

In sum, when the *Alabama Power* analysis is applied to supplemental unemployment benefits at issue here, it is clear that the court of appeals' decision is incorrect. SUB credits are "in the nature of a reward for length of service" (431 U.S. at 589), because they "confer[ ], in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment." *Foster* v. *Dravo Corp.*, *supra*, 490 F.2d at 59. Thus they are perquisites of seniority entitled to protection under the Act. See Also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766, 782 n.1 (1976); J.M. Becker, *Guaranteed Income for Unemployed—The Story of SUB* (1968); S. Slichter, J. Healy and E. Livernash, *The Impact of Collective Bargaining on Management* 458–459 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 78-3266.

December 12, 1978.

THOMAS E. COFFY, PLAINTIFF-APPELLANT

v.

REPUBLIC STEEL CORPORATION,
DEFENDANT-APPELLEE.

Before WEICK and CELEBREZZE, Circuit Judges, and PECK, Senior Circuit Judge.

WEICK, C.J.: This case is before this Court for the second time. The issue presented is whether Supplemental Unemployment Benefits (SUB) provided by defendant are incidents of seniority protected under the Military Selective Service Act of 1967, recodified in the Vietnam Era Veterans' Readjustment Act of 1974, 38 U.S.C. §§2021, *et seq.* The district court originally held that the SUB payments were not protected under the Act and entered judgment for defendant. In an unpublished order dated July 12, 1977, No. 76-1160, this Court vacated the judgment of the district court and remanded the cause for reconsideration in light of *Alabama Power Co. v. Davis*, [81 LC ¶13,255] 431 U.S. 581 (1977), decided after entry of the district court's judgment.

On remand, the district court adhered to its original position and reaffirmed its entry of judgment in favor of

defendant. The cause was resubmitted to this Court on the briefs and oral arguments of counsel and the Court has studied the record and is fully advised in the premises.

The Court is of the opinion that the SUB payments are not protected by the Act for the reasons set forth in Judge Thomas' second opinion for the district court. *See Aiello v. Detroit Free Press, Inc.*, [83 LC ¶10,335] 570 F.2d 145 (6th Cir. 1978). *But see Akers v. General Motors Corp.*, [74 LC ¶10,239] 501 F.2d 1042 (7th Cir. 1974); *Hoffman v. Bethlehem Steel Corp.*, [70 LC ¶13,562] 477 F.2d 860 (3d Cir. 1973).

It is therefore ordered that the judgment of the district court be, and it hereby is, affirmed.

APPENDIX B

THOMAS E. COFFY, PLAINTIFF,

v.

REPUBLIC STEEL CORP., DEFENDANT.

Civ. A No. C74-217.

UNITED STATES DISTRICT COURT,
N.D. OHIO, E. D.

March 15, 1978.

MEMORANDUM AND ORDER

WILLIAM K. THOMAS, District Judge.

Following the decision of the United States Supreme Court in *Alabama Power Co. v. Davis*, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (5th Cir., June, 1977) the United States Court of Appeals for this circuit vacated this court's judgment in favor of the defendant and remanded the case for reconsideration in light of *Alabama Power*. In the last paragraph of its memorandum and order of August 29, 1975, this court summarized its ruling:

> Qualification for SUB [Supplemental Unemployment Benefits] credit units does not depend upon mere passage of time. During his period of military service it is determined that plaintiff did not automatically accrue SUB credit units, as a "perquisite of seniority." Consequently, section 7.2 of the SUB Plan barring the plaintiff from receiving SUB credit units during his period of military service is valid and enforceable under section 9(c)(1) of the Act. [P. 17, original memorandum.]

Applying section 9 of the Military Selective Service Act, 50 U.S.C. §459, the Supreme Court in *Alabama*

Power determined that an employee resuming employment after military service is entitled to "credit toward his pension for his period of military service." The court considered "Davis' right to pension credit for his years in the military in light of" principles derived from prior cases relating to seniority rights under section 9 of the Act. After reviewing its most recent cases, *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966) and *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975),[1] the Court thus stated their essence:

> . . . our cases have identified two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by §9. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short term compensation for services rendered, it is not an aspect of seniority within the coverage of §9.

[1] Treating Accardi's veteran's right to severance pay under the collective bargaining contract as a "perquisite of seniority," the Court thus summarized its decision:

> While questioning the company's argument because of the "bizarre results possible under the definition of 'compensated service,' *id.* [383 U.S.], at 230 [86 S.Ct., at 771], we rejected it because the 'real nature' of the payments was compensation for the lost rights and expectations that accrued as the employees' longevity on the job increased.

431 U.S. at 588, 97 S.Ct. at 2006.

Foster v. Dravo Corp. dealt with a veteran's claim for vacation pay. Foster worked for Dravo for the first seven weeks of 1967, spent eighteen months in military service, and returned to work for the last thirteen weeks of 1968. Although the collective bargaining agreement required twenty-five weeks of work in a calendar year to receive full vacation benefits, plaintiff Foster claimed entitlement to vacation pay for both 1967 and 1968. The Supreme Court in *Alabama Power* said of its holding in *Foster*:

In *Alabama Power*, the Court had no trouble finding that "the reasonable certainty" requirement of earlier veteran's rights ruling in *McKinney v. Missouri K–TR Co.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958), and *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590 (1964), had been met. The Court noted that "[r]espondent's [Davis's] work history both before and after his military tour of duty demonstrates that if he had not entered the military, he would almost certainly have accumulated accredited service for the [relevant] period." Similarly, in Coffy's case, as recognized in this court's memorandum of August 29, 1975, "the parties agree that plaintiff Coffy would have been entitled to 52 [the maximum] SUB credits at the time of his layoff had he been working at Republic rather than engaged in military service."

Turning to the "nature of the benefit itself," the second "ax[is] of analysis" to be considered, the Supreme Court confronted Alabama Power's argument that:

> Again focusing on the nature of the benefit at issue, we rejected Foster's claim. Vacation benefits, we held, are "intended as a form of short term compensation for work performed," *id.* [420 U.S.], at 100 [95 S.Ct., at 854], not as a reward for longevity with an employer. In reaching this conclusion, we noted the work requirement imposed by the collective-bargaining contract, the proportionate increase in vacation benefits that resulted from overtime work, and the availability of pro rata benefits if an employee was laid off before he had worked the required number of weeks. These facts however, were sufficient only to "lend substantial support," *id.*, at 100 [95 S.Ct., at 884] to the employer's argument that the vacation benefits were a form of pay for work done. The nature of the benefits—"the common conception of a vacation as a reward for and respite from a lengthy period of labor," *id.*, at 101 [95 S.Ct. 879],—was decisive.

431 U.S., at 589, 97 S.Ct. at 2007.

> [P]ension payments should be viewed as compensation for service rendered like the vacation payments in *Foster*, rather than as a perquisite of seniority like the severance payments in *Accardi*.

While agreeing that "pension payments have some resemblance to compensation for work performed," the Court concluded:

> Other aspects of pension plans like the one established by petitioner suggest that the "true nature" of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the *lengthly period required for pension rights to vest in the employee*. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service *when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment*. [Emphasis added.]

Thus, the Court determined that pension benefits are a perquisite of seniority; and military service counts as part of the employee's continuous service.[2]

What then is the "true nature" or "real nature" of the SUB benefit sought by Coffy under the Collective Bargaining Plan established by the United Steel Workers and Republic Steel?[3] The purpose of the SUB plan was thus described in the original memorandum:

---

[2]The Pension Agreement, Section 5.1(b)(4) between Republic Steel Corporation and United Steel Workers of America expressly recognizes what *Alabama Power* decided; namely, that continuous service, essential to establish pension eligibility, is not broken by military service.

[3]In overruling plaintiff's motion for reconsideration of the court's judgment of August 29, 1975, this court stated that "the court's opinion did treat—and in sufficient detail, it is believed—the 'real nature' of the SUB credits under consideration, as the court understands the meaning and present applicability of this term."

> The plan supplements "state system unemployment benefits" and provides "other benefits related to unemployment."
>
> * * * * *
>
> A "benefit" under the plan includes "a Weekly Benefit, Short Week Benefit, or relocation allowance." Plaintiff's [Coffy's] claim for additional credit units involves Weekly Benefits. [P. 4, original memorandum.]

This court posed the issue:

> The decision in this case, applying the essence of *Foster*, turns on whether the Plan's SUB credit units are "designed to measure time on the payroll rather than hours on the job," and whether the qualification for credit units is a "work requirement [that] constitutes a bona fide effort to compensate for work actually performed." [P. 10, original memorandum.]

Applying *Foster*, the court analyzed this SUB plan upon the full evidentiary record developed at the trial and concluded:

> "[H]ours worked for the Company" in any week, the first qualification for earning a ½ credit unit, meets the *Foster* test of a "work requirement." It constitutes a bona fide effort to relate qualification for weekly benefits under the SUB Plan to work actually performed, as is designed to measure "hours on the job" rather than "time on the payroll." [Pp. 11–12, original memorandum.]

A covered Republic Steel employee depletes his SUB credits by receiving benefits during a layoff due to unemployment. Upon resuming employment, his weekly hours of work or wage substitutes (as explained in the original memorandum) rebuild his credits back to the maximum level of fifty-two credits (fifty-two weeks). Thus, this court concludes that SUB benefits are "in the

nature of short term compensation for services rendered" and "not an aspect of seniority within the coverage of §9," *Alabama Power, supra*, 431 U.S. at 589, 97 S.Ct. at 2007. Or in the words of *Aiello v. Detroit Free Press, Inc.*, 570 F.2d 145 (6th Cir., 1978) (a section 9-vacation pay case), entitlement to SUB benefits "require[s] more than continued status, such as a work requirement demanding actual performance on the job."

Moreover, the completion of "two years of continuous service prior to his lay-off" (a universal requirement of eligibility) does not relate the benefits to length of service, as plaintiff argues, since the same minimum period applies equally to all employees. Hence, judged by their "real nature," SUB benefits are not perquisites of seniority.

Plaintiff cites *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a Title VII case that, among other things, held that an award of seniority retroactive to the date of an individual job application was appropriate under Title VII's objective of making persons whole for injuries suffered on account of unlawful employment discrimination. The majority opinion in *Franks* recognizes that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this nation." While the majority opinion speaks separately of "competitive status" seniority and "benefit" seniority,"[4] this distinction was not germane to the Court's ruling, and the Court did not decide the present issue of whether SUB benefits are a perquisite of seniority

[4]Note 1 to Judge Powell's concurring opinion, referring to "Benefit" type seniority lists as examples "pensions, paid vacation time, and unemployment insurance." This dictum cannot effect the present case. The Court in *Foster v. Dravo Corp., supra*, specifically has held that section 9 seniority rights do not apply to "paid vacation time;" and the generalized mention of "unemployment insurance," not spoken in a section 9 context, offers no authority in this case.

under section 9 of the Universal Military Training and Service Act of 1948. The Court's references to section 9 and cases decided under that section were rather to support the Court's holding "that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Id.* at 778, 96 S.Ct. at 1271.

Citing *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (3rd Cir. 1973), and *Akers v. General Motors Corp.*, 501 F.2d 1042 (7th Cir. 1974), the plaintiff states:

> In the only two appellate decisions addressing the precise issue involved in this case, the Third and Seventh Circuits have held that SUB benefits constitute "perquisites of seniority" entitled to the protection of the Act.

This court reaffirms its refusal to follow *Hoffman* on the grounds and for the reasons stated at pp. 14–17 of its original memorandum of August 29, 1975. In part, this court in that opinion pointed out:

> Section 2.0 of the Bethlehem SUB Plan thus construed is identical with section 2.0 of the Republic SUB Plan. However, it is apparent that the court of appeals interpreted section 2.0 without benefit of the factual record developed in the present case. The facts relating to the steel industry received by this court are not mentioned in either the opinion of the court of appeals or the opinion of Judge Gourley, 335 F.Supp. 968 (W.D.Pa.1972)
>
> Circumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. Therefore, it was unrealistic for the court of appeals to say in *Hoffman* that the SUB Plan makes "distinction . . . between an employee who works 1 hour during the week and one who works 40 hours during the week." The Plan must be construed in light of actual conditions in

the steel industry. The possibility of an employee working only one hour during any week does not exist. Yet upon this hypothesis, the court concludes that "when the plan is analyzed, the same 'bizarre results' are possible under Bethlehem's plan as were possible under *Accardi*." Given the universal employment practices of the steel industry the "bizarre results" of *Accardi* could not have occurred at Bethlehem, and have not occurred at Republic, as the facts disclose.

Akers involved a General Motors SUB plan that differed in an important respect from the steel industry SUB plan. The Seventh Circuit, describing the General Motors plan, stated:

> Credit units are accrued "for each Work Week for which an Employee receives any pay from the Company" and for work weeks "for which he does not receive pay from the Company but for which he receives a [so-called] Leveling Week Benefit." So that whether an employee actually works or not, one-half credit accrues to his benefit each week.

Id. at 1044. This provision of the General Motors Sub plan was crucial to the *Akers* decision. The *Akers* court stated:

> Under GM's contention here, an employee in a layoff status and doing no actual work is entitled, under the bargaining agreement, to accrue leveling week benefit credits; yet a veteran, also doing no actual work, is precluded by the Agreement from the same credits and benefits . . . Under GM's contention, when the returning veteran steps back on the escalator after his military service, he loses what the non-veteran has gained. We reject the contention because clearly, under SUB, credit units accrue as time passes, whether an employee does or does not work. We think the contention if sustained would discriminate against the veterans by depriving them of an important element of

> seniority due them and would be a "bizarre result" as in *Accardi* and thus offend the liberal Congressional purpose of §9.[5]

As noted above, the "bizarre results" of *Accardi* "have not occurred at Republic, as the facts disclose."

Upon due consideration of *Alabama Power Co. v. Davis, supra*, the additional arguments of counsel since remand, and upon the entire record, this court reaffirms its August 29, 1975 ruling, its findings of facts and conclusions of law. Judgment is granted in favor of the defendant and against the plaintiff.

IT IS SO ORDERED.

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[5] *Parris* v. *General Motors Corp.*, 75 CCH Lab.Cas. ¶ 10,373 (S.C.Ind. 1974), dealt with the same General Motor's SUB plan and followed *Akers*.

APPENDIX C

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 76-1160.

July 12, 1977.

THOMAS E. COFFY, PLAINTIFF-APPELLANT

v.

REPUBLIC STEEL CORPORATION,
DEFENDANT-APPELLE

On Appeal from the United States District Court,
Northern District of Ohio.

Before WEICK, CELEBREZZE and PECK, Circuit Judges.

PER CURIAM: The judgment of the District Court is vacated and the cause is remanded for consideration in the light of *Alabama Power Co. v. Davis*, [81 LC ¶13,255] ___ U.S. ___ (No. 76-451, decided June 6, 1977) 45 U.S.L.W. 4588.

APPENDIX D

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

No C-74-217.

August 29, 1975.

THOMAS E. COFFY, PLAINTIFF

v.

REPUBLIC STEEL CORPORATION, DEFENDANT.

Before THOMAS, District Judge.

MEMORANDUM AND ORDER

THOMAS, D. J.: Plantiff Thomas E. Coffy sues his employer defendant Republic Steel Corporation to enforce reemployment rights which he claims arise under section 9 of the Military Selective Service Act of 1967, 15 U.S.C. App. §459.[1] In his complaint, filed for him by

[1]The veterans' reemployment provisions have recently been recodified, with nonsubstantive changes in wording, as 38 U.S.C. §§ 2021-2026. See the Vietnam Veterans' Readjustment Assistance Act of 1974, Title IV, § 404(a), Pub. L. 93-508, Dec. 3, 1974, 88 Stat. 1394. All proceedings in this case, however, have gone forward with reference to the previous codification, 50 U.S.C. App. § 459. Therefore, references here are to subsections 9(b) and 9(c)(1) of the 1967 Act, cited in the text. Under subsection 9(b)(B) (i) a person returning to a position in private employment from military service shall "be restored . . . to such

the United States Attorney and counsel of the Department of Labor, he alleges in paragraph VI that:

> Except for plaintiff's military service [September 9, 1969 to August 16, 1971], he would have been entitled to 52 credit units of Supplemental Unemployment Benefits (hereafter S.U.B.) during the period he was laid off, which was from September 10, 1971 to August, 1972.

Continuing the allegations of paragraph VI, plaintiff says

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position or to a position of like seniority, status, and pay . . . ." Subsection 9(c)(1) specifies that a person restored under 9(b)(A) (federal government employment) or (B) (private employment):

> . . . shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces. . . .

Construing the seniority guarantees in these previous provisions, *Fishgold v. Sullivan Drydock & Repair*, [11 LC ¶ 51,232] 328 U.S. 275, 284–85 (1946), declared that the serviceman

> . . . does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. . . .

Following the *Fishgold* decision Congress added subsection 9(c)(2), that expressly codified the holding of *Fishgold*. Subsection 9(c)(2) reads:

> It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of section 459(b)] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

> Defendant failed and refused to grant plaintiff the S. U. B. due him and paid plaintiff benefits for only (6) months, in violation of Sections 9(B) (i) [sic] and 9(c)(2)[sic] of the Act.

Denying the allegations of paragraph VI of plaintiff's complaint, defendant Republic states that

> . . . plaintiff was paid all S. U. B. benefits due him under the express language of the S. U. B. Plan, and further states that such Plan is not in violation of the Act.

Plaintiff prays

> . . . that defendant be ordered to compensate him for the benefits due him as expressed by the difference between the number of credits he was paid and the amount he would have received if his account had been fully credited; . . . .

Countering, defendant Republic prays that the complaint be dismissed.

Based upon a joint stipulation of facts each party moved for summary judgment supported by briefs. The stipulation of facts sets forth those provisions of the SUB Plan deemed pertinent by the parties. Thereafter at a hearing called by the court the collective bargaining agreement between United Steelworkers and Republic, which incorporated the Plan as part of Article XVIII, as well as the Plan, were made a part of the record. Certain questions raised at this first hearing led to a further hearing at which witnesses familiar with the history and operation of the SUB Plan testified. Their testimony has supplied answers to the questions previously raised by the court. Thus the adjudication of the case has metamorphosed from consideration of cross motions for summary judgment into a trial on the merits in which the record consists of documentary exhibits and oral testimony of knowledgeable witnes-

ses. After the record was closed oral argument of counsel was presented.

I. Supplemental Unemployment Benefits (SUB) is a creature of collective bargaining between the major steel companies (including Republic) and United Steelworkers of America. The first SUB Plan was established in 1956. Pursuant to further collective bargaining the Plan was revised in 1960, effective in 1962, and on later occasions. The latest revision became effective January 21, 1969.

Testimony concerning SUB and the provisions of the Plan was received from Joseph Senturia and James Carney. Mr. Senturia is an associate of Murray W. Latimer, consultant to United Steelworkers of America in the field of pensions and SUB. Mr. Carney is an attorney for U.S. Steel Corporation employed in the general labor and personnel area with emphasis on employee benefits. He has had experience in the drafting and enforcement of the SUB Plan.

Before reciting the facts relevant to the plaintiff's claim, pertinent provisions of the SUB Plan and testimony explaining key provisions will first be reviewed. The plan supplements "state system unemployment benefits" and provides "other benefits related to unemployment." The ensuing description of the plan is taken from the Handbook on Supplemental Unemployment Benefit Plan for Employees of Republic Steel (1969).

A "benefit" under the plan includes "a Weekly Benefit, Short Week Benefit, or relocation allowance." Plaintiff's claim for additional credit units involves Weekly Benefits.

> To be eligible for a Weekly Benefit, an employee must be on a layoff . . . which occurred in a reduction in force or as a result of the permanent shutdown of the plant, department or subdivision thereof; he must have completed two years of continuous service prior to his layoff;. . . .

A person is on "layoff" when because of lack of work in any week ". . . he does not work at all for the company." In addition, he must comply with certain reporting requirements, receive a state unemployment benefit for the week, be available for work, and maintain an active registration with the state employment service. An employee is disqualified from receiving a Weekly Benefit if he quits, he was suspended or discharged, or his unemployment was a consequence of a strike, slowdown work stoppage, picketing, or concerted action under certain described conditions. He is also disqualified if his unemployment results from his refusal to accept a work assignment, which he is required to accept under any applicable labor agreement. Also, he is ineligible to receive a Weekly Benefit for any week under certain other conditions, including any week in which he claims and is eligible for sickness and accident or total disability benefits, or "[w]hen he is in the military service, including training encampments."

Separate provisions apply to "Short Week Benefits." An analysis of these provisions, combined with the testimony of Mr. Carney, makes it clear that "Short Week Benefits" are paid for "partial unemployment." Partial unemployment occurs in any week in which an employee with two or more years of continuous service works, but for fewer than 32 hours.

Section 7.2 of the Plan, entitled "Military Service," provides in its first sentence:

> If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purpose of the Plan to be on leave of absence and shall not be entitled to any Benefit.

Republic rests its defense, in part, on the last sentence of section 7.2 which specifies:

> Only the credit units credited to [an employee] at the time of his entry into such service shall be

credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law.

According to section 2 of the Plan, "Duration of Weekly Benefits," the number of weeks for which an employee may be paid a weekly benefit "depends on his number of credit units." He earns a half credit unit for each week in which he has any of the following hours:

a. Hours worked for the Company,
b. Hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance,
c. Hours not worked and not paid for but which were lost because:
(1) He was performing his duties as a member of the Grievance Committee, or
President, Vice-President, Recording Secretary, Financial Secretary and/or Treasurer of a Local of the Union which is his collective bargaining representative, or
(2) He was absent because of disability for which benefits are payable under a Workmen's Compensation or Occupational Disease law or the Company Program of Insurance Benefits.
However, an employee will not receive credit for weeks occurring when he has 52 credit units, which is the maximum number he may have.

In the initial (1956) version of the Plan the hours spent in any of the three categories (a through c) were labeled credited hours. An eligible employee accumulated 1/10 of a SUB credit unit for every eight credited hours. Effective in 1962 the parties agreed to the deletion of the proportional requirement and substituted the provision which has been carried forward in section 2.0 to this day. The company recognized that it was unnecessary to relate the accumulation of credit units to the specific number of hours worked because it was unusual for an employee to work less than 32 hours. Witness Carney attributed the minimum 32-hour workweek to the around-the-clock nature of the steel making process and provisions of the labor agreement which would render it infeasible for the company to employ persons one or two hours a day or for only one or two days in any week.[2]

Plaintiff Coffy was first employed by Republic Steel from April 30, 1968, until September 7, 1968, at which time he was laid off and subsequently quit of his own free will. The plaintiff was again employed by Republic Steel as a crane operator from January 24, 1969, until his entry into the armed services on September 9, 1969. His military service continued until August 16, 1971, when he was honorably discharged.

Plaintiff applied for reinstatement on September 14, 1971, at which time Republic was in the process of laying off employees and had passed Coffy's seniority date. In conformance with the "seniority escalator" principle of *Fishgold*, *supra* n. 1, and subsection 9(c)(2), Coffy was reinstated in layoff status and was eventually recalled to work on July 1, 1972. During the period of

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[2] One of these contractual provisions, Art. 6, § 6 of the union contract, guarantees a minimum of four hours of work, or four hours of pay if no work is available, if an employee reports for work as scheduled or notified. Mr. Carney regarded the "Short Week Benefit" provision of the SUB Plan as the company's most significant incentive to utilize employee time fully. He explained that this article, § 4 of the SUB Plan, essentially requires the company to pay an employee for 32 hours of work in any week in which the employee works for some but less than 32 hours. Because of this contractual requirement it is not financially feasible to schedule operations in which employees do not work a minimum of 32 hours in any but the most unusual conditions. A third provision, Art. X, § 7 of the basic labor agreement, results in scheduling employees at least four days a week. It requires the company to consult with the grievance committee whenever a decrease of work ". . . results in the reduction to an average of 32 hours per week for the Employees in the seniority units and a further decrease of work appears imminent. . . ."

layoff he received SUB from Republic for approximately six months (approximately 25 credits).[3]

The parties agree that plaintiff Coffy would have been entitled to 52 SUB credits at the time of his layoff had he been working at Republic rather than engaged in military service. Thus the issue joined by the parties concerns the plaintiff's claimed entitlement to the accrual of credit units during his period of military service.

II. Plaintiff argues that accrual of credit units for weekly benefits payable under the SUB Plan is a "perquisite of seniority," a term Mr. Justice Black originated in *Accardi v. Pennsylvania R. Co.*, [53 LC ¶ 11,073] 383 U.S. 225 (1966). The Court held that the severance payments in that case were "just as much a prerequiste of seniority as the more traditional benefits such as work preference and order of lay-off and recall." *Id.* at 230. Since perquisites of seniority are guaranteed to him under the Court's broad reading of "seniority" in section 9, the plaintiff argues that he is entitled to accrual of SUB credit units during his period of military service, as a "perquisite of seniority."

Meeting this argument defendant points to the Supreme Court's amplification of *Accardi* in *Foster v. Dravo Corp.*, [76 LC ¶ 10,658] 420 U.S. 92 (1975), affirming [72 LC ¶ 14,194] 490 F.2d 55 (3 Cir. 1973). Applying *Foster*, defendant insists that entitlement to weekly benefits under the SUB Plan constitutes "other benefits" under section 9(c)(1), which are governed by the Plan

> . . . pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with [Republic] at the time [the plaintiff] was inducted into [the armed forces]. . . .

[3] Republic Steel erroneously credited Coffy with his previous employment in 1968 for SUB purposes, and as a result is currently deducting $20 per pay period to recover approximately $322 in benefits (approximately 9 credits) he allegedly was overpaid.

In denying the plaintiff SUB credit units during his military service defendant Republic says it acted in accordance with the last sentence of section 7.2 of the Plan, which provides that "[o]nly the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an Employee of the Company. . . ."

In *Foster v. Dravo Corp.*, *supra* the question presented was whether section 9 of the Act

> entitle[d] the veteran to vacation benefits when, because of his departure for military service, he has failed to satisfy a substantial work requirement upon which the vacation benefits are conditioned.

420 U. S. at 93–94. The collective bargaining agreement between Foster's union and Dravo required employees to work a minimum of 25 weeks in each calendar year in order to earn full vacation benefits. Foster was denied vacation credits for the two-year period during which he served in the military. He claimed that

> . . . since he would have earned two vacations if he had worked for respondent throughout the time he was in service, § 9 of the Military Selective Service Act requires that he be credited with the benefits even though he failed to meet the 25-week work requirement in either year.

490 U.S. at 95. Both the trial court and the appellate court denied Foster's claim; the Supreme Court affirmed.

Petitioner Foster relied on *Accardi*, *supra* and *Eagar v. Magma Copper Co.*, [56 LC ¶ 12,335] 389 U.S. 323 (1967). In *Eagar* a per curiam opinion relying on *Accardi* reversed a judgment for the company, which had denied a veteran's right to vacation pay and holiday

pay. Justice Marshall's opinion in *Foster* explicates *Accardi* thus:

> The dispute in that case concerned a veteran's eligibility for a severance payment. Under the applicable collective bargaining agreement, the amount of severance pay due each employee depended on the length of the employee's "compensated service" with the respondent railroad. The railroad argued that the act was inapplicable because the amount of the severance payment did not depend directly on seniority. The Court, however, took a broader view. Looking beyond the narrow characterization of seniority rights in the collective-bargaining agreement, the Court concluded that the severance payments were not intended as a form of deferred compensation for work done in the past, but rather as a means of compensating employees for the loss of rights and benefits accumulated over a long period of service. Accordingly, the Court held that the severance payments in that case were "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall."

420 U.S. at 98 (citations omitted). *Foster* then distinguishes *Accardi* and *Eagar*.

> Petitioner argues that under *Accardi* and *Eagar* the vacation benefits in this case must be granted to him as a returning serviceman because the entitlement to a vacation is not closely correlated to the amount of work actually performed by the employee. Under the collective-bargaining agreement, a Dravo employee theoretically could earn full vacation benefits by doing as little as one hour's work in each of 25 weeks during the year. From this, petitioner concludes that the agreement really conditions vacation benefits only on continued employment, and that Dravo therefore could not legally deny him full vacation benefits for either 1967 or 1968.

Id. at 99. The Court determined that such an approach would extend the statute beyond the limits of prior cases. It then fashioned the following rule:

> Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation. Of course, as in the *Accardi* case, the work requirement may be so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be granted to returning veterans. But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

Id. at 99–100.

The decision in this case, applying the essence of *Foster*, turns on whether the Plan's SUB credit units are "designed to measure time on the payroll rather than hours on the job," and whether the qualification for credit units is a "work requirement [that] constitutes a bona fide effort to compensate for work actually performed."

As previously seen the particular qualifications for SUB credit units have remained the same price since 1962, seven years before the plaintiff left his position at Republic to enter the armed forces. Under section 2 of the Plan an employee is credited with ½ credit unit "for each week . . . in which he has any of [three types of] hours." The first type is "hours worked for the Company." Although this appears to be a "work requirement," as explicated in *Foster*, the government questions the bona fides of such an assertion. Obtaining a concession from Mr. Senturia that there is no minimum number of hours required to be worked in any week to qualify for a ½ credit unit, Government counsel asked

Mr. Senturia "would one hour be sufficient?" He answered,

> Well, one hour theoretically would; although I think as a matter of [the Labor] Agreement, an employee would not be paid just for one hour.

The uncontradicted testimony of Mr. Carney conclusively shows that the possibility, elicited in the questioning of Mr. Senturia, of an employee working only one hour in any week and thereby qualifying for SUB bears no relationship to actual practice in the industry. Under conditions existing at Republic and other steel mills, it is very unusual for an employee to work less than 32 hours in any week. Mr. Carney attributes this minimum period (1) to the round-the-clock nature of the steelmaking process and (2) to provisions of the collective bargaining agreement which render it infeasible to employ persons one or two hours a day or for only one or two days in any week. These provisions are summarized at Note 2, *supra*.

Hence, it is concluded that "hours worked for the Company" in any week, the first qualification for earning a ½ credit unit, meets the *Foster* test of a "work requirement." It constitutes a bona fide effort to relate qualification for weekly benefits under the SUB Plan to work actually performed, and is designed to measure "hours on the job," rather than "time on the payroll."

The other two types of hours in a workweek that earn a ½ credit unit, *supra* at 5 are (b) hours paid for but not worked, "such as vacation hours or jury allowance," and (c) "hours not worked and not paid for" but lost because of (1) performance of designated local union duties or (2) absence from work due to disability for which benefits are payable under a workmen's compensation or occupational disease law "or the Company Program of Insurance Benefits." Categories (b) and (c) are characterized by witness Carney as "wage substitutes." He explained that SUB credits are awarded under circumstances such as these in which tradi-

tionally steel corporations had paid compensation in the form of wages and wage substitutes. With regard to credits given to local union officials for the performance of their duties, he explained that these officials are attached to the work force and work in the plant when not performing their union duties. Union duties performed as members of grievance committees or as local officers are patently work related.

Traditionally recognized in the steel industry as wage substitutes, the hours in any week which earn an employee a ½ credit unit under the Plan's sections 2(b) and (c) are reasonably justifiable parts of total SUB plan. Just as "hours worked for the Company" in any week constitute a valid "work requirement" qualifying a person for a ½ credit unit, the Plan's specification that only an employee engaged in a work-related substitute activity may receive SUB credits establishes a valid work requirement.[4] In both situations the *Foster* test is satisfied.

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[4] On the record before the Court in *Foster* the Court's use of the term "work requirement" must be found to have a broader meaning than hours actually worked. Dravo's collective bargaining agreement with the union that established vacation pay, the subject of the *Foster* suit, provided that in the computation of "hours or shifts worked by an employee for purposes of determining . . . vacation pay," hours or shifts worked included:

a. Shifts or parts of shifts lost by employees when unable to work on account of injuries sustained by accident arising out of and in the course of their employment. . . .

b. Shifts or parts of shifts lost by employees on days when they report to work as required, but are not put to work or are sent home before the end of the shift for any reason beyond the employee's control.

. . .

d. Shifts lost because of absence on jury duty for which the employee is paid . . . .

e. Shifts lost because of absence on union business paid for by the Union in connection with contracts with Dravo Corporation . . . .

f. Hours lost by Officers of the Union and the members of the Negotiating, Grievance and Pension Committees while out of

Plaintiff leans on *Hoffman v. Bethlehem Steel Corp.*, [70 LC ¶ 13,562] 477 F. 2d 860 (3 Cir. 1973), which examined the same steel SUB Plan under consideration here. An employee returning to his employment with Bethlehem after a period of military service sought and was denied in the trial court SUB credits for his period of military service.

In reversing, the court of appeals observed:

> Here the learned trial judge observed that Bethlehem's SUB benefits are accrued based on hours worked as spelled out in section 2.0(c)(1)(ii) of the SUB Plan. However, when that plan is analyzed, the same "bizzare results" are possible under Bethlehem's plan as were possible under *Accardi*. In *Accardi* the court noted absolutely no distinction was made between a man that worked one day a month for seven months and one who worked 365 days. This fact made it obvious that severance benefits did not in fact depend upon hours work [sic] but upon seniority. Similarly, in Bethlehem's plan no distinction is made between an employee who works 1 hour during the week and one who works 40 hours during the week. Each would accrue one-half of a SUB credit. It is illogical to say that a plan which permits the accrual of benefits to employees who worked 7 days out of 365 is based upon the passage of time while a plan which permits the accrual of benefits to an employee who works 1 hour out of 40 is based upon something more than the passage of time. In each,

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the Plant on Union business connected with the Dravo Corporation . . . .

Agreement between Dravo Corporation, Engineering Works Division, Neville Island Heavy Metals Plant, Pittsburgh, Pa. and Industrial Union of Marine and Shipbuilding Workers of America, Local Union No. 61, AFL-CIO, 1966-1968, § 5. These provisions are substantially the same as the provisions of sections 2.0(b) and (c) of the SUB Plan, established pursuant to the collective bargaining agreement between Republic and the United Steelworkers of America.

> the employee receives credit for a full-time period regardless of the fractional part of the period which he works.

Id. at 863-64. The court then found that "the SUB credits accrued pursuant to this Plan are seniority rights and as such are protected by § 9(b)." *Id.* at 864.

Section 2.0 of the Bethlehem SUB Plan thus construed is identical with section 2.0 of the Republic SUB Plan. However, it is apparent that the court of appeals interpreted section 2.0 without benefit of the factual record developed in the present case. The facts relating to the steel industry received by this court are not mentioned in either the opinion of the court of appeals or the opinion of Judge Gourley, 335 F. Supp. 968 (W.D. Pa. 1972).

Circumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. Therefore, it was unrealistic for the court of appeals to say in *Hoffman* that the SUB Plan makes "no distinction . . . between an employee who works 1 hour during the week and one who works 40 hours during the week." The Plan must be construed in light of actual conditions in the steel industry. The possibility of an employee working only one hour during any week does not exist. Yet upon this hypothesis, the court concludes that "when that plan is analyzed, the same 'bizzare results' are possible under Bethlehem's plan as were possible under *Accardi*." Given the universal employment practices of the steel industry the "bizzare results" of *Accardi* could not have occurred at Bethlehem, and have not occurred at Republic, as the facts disclose.

In distinguishing *Hoffman* in *Foster v. Dravo Corp.*, *supra* the court of appeals states:

> Thus, like the agreement in *Accardi*, the *Hoffman* contract contained an express provision that permitted a "bizarre result;" that is, an em-

ployee who worked one hour each week could accrue as much SUB credit as one who worked forty hours a week.

490 F.2d at 59. Relying on this language from *Hoffman*, distinguished but not overruled by the court of appeals in *Foster*, plaintiff's counsel at oral argument sought to find support from the Supreme Court's affirmance of the court of appeal's decision in *Foster*. Since the Court's opinion is silent on *Hoffman*, plaintiff's argument is strained at best. But more importantly, the Court's grounds for distinguishing *Accardi*, on which *Hoffman* relied, in *Foster* render untenable the plaintiff's argument that the Supreme Court decision in *Foster* offers an implied approval of *Hoffman*. Indeed, the Court's language in *Foster* cuts the other way. It expressly holds that, unlike the *Accardi* situation,

> . . . where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

420 U.S. at 99–100. At most it is arguable that the work requirement "correlates only loosely with the benefit" of SUB credits under section 2.0 of the SUB Plan. Actually, as previously indicated, section 2.0 contains a "work requirement that constitutes a bona fide effort to compensate for work actually performed," or for work related substitutes for work performed. Hence, the correlation of the SUB credits with the work requirement, even if a loose one, "is not enough to invoke the statutory guarantee" of seniority.

The court of appeals in *Foster* indicated that in *Hoffman*

> . . . the Court was confronted with a contract granting employees on leaves of absence for certain enumerated reasons [i.e., vacation pay, jury duty,

> performing responsibilities as a union officer, or disability due to a work connected injury] the right to accumulate SUB credits, while denying such rights to employees on leave for other reasons.

490 F. 2d at 59. This conclusion is not consistent with the collective bargaining agreement in the steel industry. The agreement does not classify as leave of absence any of those conditions: vacation time, jury duty, time spent performing responsibilities as a local union officer, or time off due to a disabling work connected injury. On the contrary, the record in this case shows that the steel industry recognizes these situations as "wage substitutes," clearly inconsistent with a leave of absence status. However, the collective bargaining agreement does recognize several conditions as warranting a "leave of absence." For example, ". . . leaves of absence for the purpose of accepting positions with the International or Local Unions . . ." are recognized under Article X, Section 10 of the collective bargaining agreement. Yet, the SUB Plan does not grant SUB credits for this or any other leave of absence. Hence, neither the SUB Plan, the steel industry collective bargaining agreement, nor employment practices of the industry warrant *Foster's* statement that

> [t]his case does not present a dilemma like the one this Court faced in *Hoffman*—some employees on leaves of absence received SUB credits under the agreement while others did not.

490 F.2d at 63. On the entire record it is concluded that the leave of absence status granted the plaintiff while in the military service by virtue of section 9(c)(1), and also granted under section 7.2 of the SUB Plan, does not fall unequally or inequitably on the plaintiff. Other persons granted leaves of absence under the collective bargaining agreement do not earn SUB credits while on leave of absence.

III. It is concluded, therefore, that neither *Accardi* nor *Hoffman* controls this case. Qualification for SUB credit units does not depend upon mere passage of time. During his period of military service it is determined that plaintiff did not automatically accrue SUB credit units, as a "perquisite of seniority." Consequently, section 7.2 of the SUB Plan barring the plaintiff from receiving SUB credit units during his period of military service is valid and enforceable under section 9(c)(1) of the Act.

Upon the stated grounds and for the foregoing reasons judgment is granted in favor of the defendant and against the plaintiff.

It Is So Ordered.

APPENDIX E

No. 78-3266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS E. COFFY, PLAINTIFF-APPELLANT,

v.

REPUBLIC STEEL COPORATION, DEFENDANT-APELLEE

ORDER

[Filed: Feb. 16, 1979]

Before: WEICK, CELEBREZZE, Circuit Judges and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing with the suggestion that it be heard en banc, and a majority of the active judges of this court not having voted for rehearing en banc, the petition to rehear was referred to the hearing panel.

Upon consideration, the court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk

FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-81

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1979
CERTIORARI GRANTED OCTOBER 29, 1979

In The Supreme Court of the United States

OCTOBER TERM 1979

No. 79-81

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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DATE	PROCEEDINGS
3/13/74	Complaint filed. Summons issued to U.S. Marshal.
3/20/74	Summons retn. & filed. Served deft. through David Schryver on 3/18/74. Fees $3.00
4/9/74	Answer of defendant filed. Copy mailed 4/8/74.
11/15/74	Letter from atty. French re: discovery filed.
4/22/75	Stipulation of facts of U.S.A. filed.
4/22/75	Motion for summary judgment by pltf. filed. Copy mailed 4/23/75.
5/8/75	Motion of deft. for summary judgment with memorandum in support filed. Copy mailed 5/7/75.
5/16/75	Memorandum of pltf. in opposition to deft.'s motion for summary judgment filed. Copy mailed 5/16/75.
6/4/75	Motion of deft. for leave to file reply brief filed. Copy mailed 6/4/75.
6/6/75	Endorsed order granting motion of deft. for leave to file reply brief. Thomas, J. Copies mailed.
6/6/75	Reply Brief of deft. in support of motion for summary judgment filed. Copy mailed.
6/26/75	Minutes of proceedings filed. Thomas, J. Kraemer, R. Further hearing set on 7/1/75 at 9:30 a.m.
7/31/75	Minutes of proceedings filed. Thomas, J. Czompoly, R. Evidentiary hrg. begun; final arguments made; ruling reserved for written opinion.
8/29/75	Memorandum and Order granting judgment in favor of the defendant and against the plaintiff filed. Thomas, J. Copies to Nims, Schwarzwald, Taylor & Diggs.
8/29/75	Order dismissing the complaint, with prejudice, at plaintiff's costs filed. Thomas, J. Copies to Nims, Schwarzwald, Taylor & Diggs.
9/10/75	Motion of pltf. for reconsideration with memorandum in support filed. Copy mailed 9/10/75.
9/18/75	Response of deft. to motion for reconsideration filed. Copy mailed 9/18/75.

9/29/75	Memorandum and Order denying motion of deft. for reconsideration filed. Thomas, J. Copies to counsel.
10/28/75	Notice of Appeal by pltf. filed. Copy by Clerk to DeMarco & French.
11/12/75	Motion of pltf. for an extension of time for filing notice of appeal with memorandum in support filed. Copy mailed 11/12/75.
11/12/75	Order extending the time for the government to file a notice of appeal until 10/28/75, on which date the notice of appeal was filed, filed. Thomas, J. Copies to Nims & French.
12/9/75	Order extending time for transmittal of the record to the U.S. Court of Appeals until 1/26/76 filed. Thomas, J. Copy to Franch, DeMarco & court reporter.
1/19/76	Transcript of proceedings before Thomas, J. on 7/31/75 filed. Czompoly, R.
1/19/76	Certified original pleadings mailed to U.S. Court of Appeals.
2/12/76	Record filed in U.S.C.A. on 2/11/76. No. 76-1160.
9/6/77	True copy of USCA order vacating judgment of District Court and remanding cause for consideration in the light of Alabama Power Co. v. Davis. filed. issued as mandate: 9/6/77 costs $1,008.88
10/14/77	Minutes of pre-trial proceedings filed. Thomas, J. Czompoly, r. (gov't. to file brief within 30 days; deft. within 15 days of gov't. reply brief of gov't within 7 days)
12/15/77	Supplemental brief of deft. filed. copy mailed 12/15/77
11/21/77	Supplemental brief of pltf. filed. copy mailed 11/21/77
3/15/78	Memorandum and order granting judgment in favor of the deft. and against the pltf. filed. Thomas, J. copies issued 3/16/78

3/15/78	Order dismissing complaint with prejudice, at pltfs. costs filed. Thomas, J. copies issued 3/16/78
4/11/78	NOTICE OF APPEAL by pltf. filed. Re: 3/15/78 Copies issued 4/14/78
5/12/78	CERTIFIED RECORD forwarded to the U.S.C.A.
5/30/78	ACKNOWLEDGMENT OF RECORDS RECEIVED in the U.S.C.A. & filed. (5/24/78) (#78-3266)
3/2/79	CERTIFIED COPY OF ORDER affirming the Judgment of the District Court filed. Before Weick and Celebrezze, Circuit Judges, and Peck, Senior Circuit Judge. Issued as Mandate: 2/28/79. Costs: None. RECORD RETURNED.
11/7/79	CERTIFIED ORIGINAL Pleadings mailed to Clerk, U.S. Supreme Court Washington, D.C. re: per instructions from U.S.C.A. this date

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action File No. C 74-217
(Judge Thomas)

THOMAS E. COFFY, PLAINTIFF,

v.

REPUBLIC STEEL CORPORATION, DEFENDANT.

COMPLAINT

I

This is an action under Section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C.A. App. 459), hereinafter called the Act, and jurisdiction is vested in this Court pursuant thereto.

II

Defendant is a corporation and is now and at all times hereinafter mentioned was engaged in the manufacturing of iron, steel, and iron and steel products, at a place of business in Cleveland, Ohio, within the jurisdiction of this Court.

III

Plaintiff Thomas E. Coffy was first employed by defendant on April 30, 1968, as a crane Operator, a position other than temporary within the meaning of the Act.

IV

Plaintiff was laid off from his employment on September 7, 1968 and he subsequently terminated his employment. On January 30, 1969, plaintiff was reemployed. Plaintiff entered military service on September 9, 1969 and was honorably dischrged on August 16, 1971.

V

Plaintiff made timely application to defendant for reinstatement of his employment on September 10, 1971, within the time allowed by the Act and in satisfaction of all other qualifications for statutory re-employment rights under the Act. The defendant, at the time of plaintiff's application for reinstatement, was laying off employees, and had passed plaintiff's seniority date. The veteran was reinstated in a layoff status and was recalled in August, 1972.

VI

Except for plaintiff's military service, he would have been entitled to 52 credit units of Supplemental Unemployment Benefits (hereinafter S.U.B.) during the period he was laid off, which was from September 10, 1971 to August, 1972. Defendant failed and refused to grant plaintiff the S.U.B. due him and paid plaintiff benefits for only six (6) months, in violation of Sections 9(B)(i) and 9(C)(2) of the Act.

WHEREFORE, plaintiff prays that defendant be ordered to compensate him for the benefits due him as expressed by the difference between the number of credits he was paid and the amount he would have received if his account had been fully credited; and that he be granted such other and further relief as the Court may deem appropriate.

FREDERICK M. COLEMAN
United States Attorney

By _____
Richard J. French
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 74-217
(Judge Thomas)

THOMAS E. COFFY, PLAINTIFF

v.

REPUBLIC STEEL CORPORATION, DEFENDANT

ANSWER OF DEFENDANT
REPUBLIC STEEL CORPORATION

For its answer to the complaint, defendant Republic Steel Corporation:

1. Admits that plaintiff purports to bring this action as stated in paragraph 1 of the complaint, and admits that this Court has jurisdiction in this matter.

2. Admits the averments of paragraphs 2 and 3 of the complaint.

3. Admits that plaintiff was laid off on September 17, 1968, and that he subsequently terminated his employment, voluntarily leaving the employ of defendant on November 18, 1968; states that plaintiff was reemployed by defendant on January 24, 1969, and that he went on military leave effective September 9, 1969; states that it is without information or knowledge sufficient to form a belief as to whether plaintiff was honorably discharged from military service on August 16, 1971.

4. States that plaintiff made application to return to employment with defendant on September 14, 1971, admits that plaintiff was placed on a layoff status as required by his seniority date, including credit for time spent in military service, and states that plaintiff returned to work on July 1, 1972; states that it is without information or knowledge sufficient to form a belief as to whether plaintiff satisfied all qualifications for statutory reemployment rights under the Act.

5. Denies the averments of paragraph 6 of the complaint, and states that plaintiff was paid all S.U.B. benefits due him under the express language of the S.U.B. Plan, and further states that such Plan is not in violation of the Act.

6. Except as expressly admitted above, denies the remaining averments of the complaint.

WHEREFORE, having fully answered, defendant Republic Steel Corporation prays that the complaint be dismissed and that it be permitted to go hence without cost.

Victor E. DeMarco
Michael A. Nims

Jones, Day, Cockley & Reavis
1750 Union Commerce Building
Cleveland, Ohio 44115
696-3939

Attorneys for Defendant
Republic Steel Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C 74-217

THOMAS E. COFFY, PLAINTIFF

v.

REPUBLIC STEEL CORPORATION, DEFENDANT

STIPULATION

Now come the respective parties to this action and hereby stipulate the following facts:

1. Mr. Coffy was employed by Republic Steel from April 30, 1968, until September 17, 1968, at which time he was laid off, and subsequently quit of his own free will.

2. Mr. Coffy was again employed by Republic Steel as a crane operator from January 24, 1969, until his entry into the military service on September 9, 1969.

3. Mr. Coffy served in the military from September 9, 1969, until August 16, 1971, and was honorably discharged.

4. Mr. Coffy applied for reinstatement on September 14, 1971.

5. Republic Steel does not question Mr. Coffy's entitlement to reemployment rights.

6. At the time Mr. Coffy applied for reinstatement, Republic Steel was in the process of laying off employees and had passed Mr. Coffy's seniority date.

7. Under the escalator principle Mr. Coffy was reinstated in layoff status and was eventually recalled to work on July 1, 1972. Mr. Coffy received S.U.B. pay benefits from Republic Steel for approximately six months (approximately 25 credits.)

8. Republic Steel erroneously credited Mr. Coffy's previous employment in 1968 for S.U.B. purposes and as a result is currently deducting $20 per pay period to recover the approximate $322 of benefits (approximately 9 credits) he [was] allegedly overpaid.

9. There is a collective bargaining agreement between Republic Steel and the United Steelworkers of America which covers the period between August 1, 1971, and August 1, 1974. There was a similar agreement covering August 1, 1969, to August 1, 1971. Article XVIII—Supplemental Unemployment Benefits Program, Section 1—Description of Plan states the "Supplemental Unemployment Benefit Plan effective January 1, 1969 (the Plan) is contained in a booklet entitled "1969 Supplemental Unemployment Benefit Plan," a copy of which will be provided each employee. Such booklet constitutes a part of this Article Eighteen as though incorporated herein. Effective for weeks ending on or after August 1, 1971, each of the amounts shown in Paragraph 1.4 of such booklet shall be increased by $30.00.

Section 2

Coverage

A. The Plan shall, for the period specified in the termination provisions of this Agreement, be applicable to the employees (together with other employees represented by the Union).

10. There exists a Supplement Unemployment Benefit plan booklet effective January 1, 1969, referred to in Article Eighteen of the aforementioned contract. This booklet contains the provisions of the plan and states in part:

Duration of Weekly Benefits—The number of weeks for which an employee may receive Weekly Benefits depends on his number of credit units. An employee will be credited with the balance of his credit units as of December 31, 1968, under the Prior Plan, plus one-half a credit unit for each week thereafter in which he has any of the following hours:

a. Hours worked for the Company.

b. Hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance.

c. Hours not worked and not paid for but which were lost because:

(1) He was performing his duties as a member of the Grievance Committee, or President, Vice-President, Recording-Secretary and/or Treasurer of a Local of

the Union which is his collective bargaining representative, or

(2) He was absent because of a disability for which benefits are payable under a Workmen's Compensation or Occupational Disease law or the Company Program of Insurance Benefits.

However, an employee will not receive credit for weeks occuring when he has 52 credit units, which is the maximum number he may have.

Cancellation of Credit Units—An employee cannot receive any Weekly Benefit unless he has one or some fraction of a credit unit. If he has less than required to be cancelled as described in 2.3, be will receive a reduced benefit in proportion to his credit unit balance.

Normally one credit unit is cancelled for each Weekly Benefit paid. However, if a Weekly Benefit is reduced because of the receipt of other compensation (other than from the Company) only one-half credit unit will be cancelled for that Weekly Benefit.

Credit units will be cancelled whenever an employee incurs a break in continuous service. He will, therefore, not be entitled to coverage by, or benefits from, the Plan. However, any individual whose break in continuous service is removed shall have restored any credit units cancelled as a result of such break.

Eligibility for Weekly Benefits

Requirements—In order to be eligible for a Weekly Benefit, an employee must be in layoff (as defined in 3.10) which occurred in a reduction in force or as a result of the permanent shutdown of a plant, department or subdivision thereof; he must have completed two years of continuous service prior to his layoff; and he must

b. Receive a state unemployment benefit for the week. However, this requirement will not apply if he fails to receive that benefit only for one or more of the following reasons:

(1) He has exhausted his state unemployment benefits.

Disqualification—An employee will be disqualified from receiving a Weekly Benefit if:

a. He quit, or

b. He was suspended or discharged, or

c. His unemployment was a consequence of:

(1) any strike, slowdown, work stoppage, picketing or concerted action involving persons employed by the Company and covered by the Plan or members of a union which is the collective bargaining agent of the applicant, whether at any operation of the company or elsewhere.

Ineligibility—An employee may not receive a Weekly Benefit for any week when he is in the Military service, including training encampments.

Military Service—If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purpose of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law. (Exhibit AA)

11. It is agreed that Mr. Coffy would have been entitled to 52 S.U.B. credits at the time of his layoff except for his military service.

FREDERICK M. COLEMAN
UNITED STATES ATTORNEY

By _____
RICHARD J. FRENCH
ASSISTANT U.S. ATTORNEY

APPROVED BY:

_____
MICHAEL NIMS
ATTORNEY FOR DEFENDANT

[2]

FOREWORD

This booklet contains the 1969 Supplemental Unemployment Benefit Plan applicable to employees identified on the cover. This plan is intended to supplement state system unemployment benefits, and not to replace or duplicate them, and to provide other benefits related to unemployment.

The Plan was first established August 3, 1956 and has since been revised, the latest revision being effective January 1, 1969. This Plan, as so revised, applies to all weeks ending after December 31, 1968.

It is essential that each covered employee study this booklet so that he will understand how its provisions affect him. IT IS MOST IMPORTANT THAT HE READ THE PROVISIONS ON PAGES 11 through 15 so that he will make timely application and take other action necessary to qualify for benefits to which he believes he is eligible. He should also read the disputes provisions starting on page 18 so that he will take the proper steps in the event he disagrees with a determination under the Plan.

[3]

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[5]

DEFINITIONS

When used in this Plan or any agreement relating thereto, the following terms are intended to have the meanings set forth below:

"Benefit": Unless qualified in the text, a Weekly Benefit, Short Week Benefit or relocation allowance.

"Benefit year": The period used in the applicable state system in connection with establishing the amount and duration of state unemployment benefits, usually also called a "benefit year" under the state system. If no such period is in effect, another period will be used for purposes of the Plan. In the case of an employee who during a continuous layoff ends a state benefit year and cannot start a new one, his existing benefit year shall be extended until he is able to start such new state benefit year or returns to work.

"Company Program of Insurance Benefits": Any program providing insurance coverage for employees as to which the Company contributes all or some portion of the cost.

"Company": The Company named on the cover of this booklet, or any subsidiary or associated company having employees who are covered by the Plan.

"Continuous service": The continuous service of an employee as determined for pension purposes under the Company's noncontributory pension plan.

"Dependent": Any person, other than the employee, but including his or her spouse, for whom the employee is entitled to claim an exemption under the federal Internal Revenue Code or similar law, for federal income tax purposes.

"Fund": The SUB Plan trust fund.

"Other compensation": Any compensation received by the employee as wages or other remuneration from any employer or from self-employment.

[6] "Part-time employee": An employee who regularly, for his own convenience, is not available for full-time employment.

"Plan": The 1969 Supplemental Unemployment Benefit Plan set forth in this booklet.

"Prior Plan": The Supplemental Unemployment Benefit Plan in effect prior to January 1, 1969.

"Short Week Benefit": The amount of benefit payable to an employee for a week during which he works some, but less than 32, hours for the Company.

"State system": Any system or program, now in effect or hereafter established by or pursuant to any federal or state law or laws, for paying benefits to persons on account of their unemployment, under which the eligibility of a person for benefit payments is not determined by application of a means test. It is usually referred to as the state unemployment compensation system, but it may be a federal program such as that established under the Manpower Development and Training Act.

"State unemployment benefit": A benefit payable under a state system.

"Week": The period used for determing state unemployment benefits under the applicable state system, or, where no such period is established, an equivalent period used to determine eligibility for and the amount of a Weekly Benefit, unless it is clear in this Plan that it is intended to refer to a calendar week. With respect to Short Week Benefits and the determination of Credit Units, "week" means the payroll week.

"Weekly Benefit": The amount of supplemental unemployment benefit payable under the Plan for a week of layoff.

[7]

1969 Supplemental Unemployment Benefit Plan

This Plan is designed to provide a covered employee who becomes wholly or partially unemployed Weekly Benefits to provide income while he is on layoff and Short Week Benefits for any week in which he works some, but less than 32, hours for the Company. Relocation allowances are also provided for certain changes of residence required to enable laid-off employees to accept interplant job opportunities with the Company.

1. AMOUNT OF WEEKLY BENEFITS

Calculating the Benefit

1.0 The Weekly Benefit provided for a week of layoff is 26 times the employee's average straight-time hourly earnings plus $1.50 for each of not more than four dependents, subject to:

a. The deductions set forth in 1.3,

b. The maximums set forth in 1.4, and

c. Possible reduction as provided in 1.5.

1.1 The term "average straight-time hourly earnings" for the purposes of the Plan means (a) such earnings as calculated under the Prior Plan or (b) for benefit years starting after December 31, 1968, the hourly earnings which would apply if the first week for which a Weekly Benefit is payable in the benefit year were a week of vacation, adjusted to exclude the effect of overtime and Sunday premiums. Such hourly earnings shall not be changed during a benefit year except to reflect the effect of any intervening general wage change.

1.2 The number of dependents utilized in the calculation of the Weekly Benefit will be one less than the number of persons for whom the employee is claiming exemption at the time for federal income tax withholding purposes. An employee may at any time file a new Form W-4 to reflect not more than the actual number of his exemptions.

[8] *State Benefit and Other Income*

1.3 There is deducted from the amount determined in accordance with 1.0:

a. The amount of any state unemployment benefit, including any dependency allowance, received for the same week, and

b. The amount of other compensation for the week in excess of the amount disregarded in determining the amount of state unemployment benefit.

Weekly Benefit Payable—Maximums

1.4 The Weekly Benefit the employee will receive is (unless 1.5 applies) the amount determined by the steps described in 1.0 through 1.3 or one of the following maximums, if lower:

a. For any week for which he receives a state unemployment benefit, the maximum is determined from the following table based on the number of his dependents:

None	*One*	*Two*	*Three*	*Four or More*
$52.50	$54.00	$55.50	57.00	$58.50

These maximums shall also apply to any week for which the only reason for an employee's not receiving a state unemployment benefit is the amount of other compensation he is receiving or because he had earlier received state unemployment benefits in the same benefit year for weeks as to which he was not eligible to receive Weekly or Short Week Benefits.

b. For all other weeks the maximum is determined from the following table based on the number of his dependents:

None	*One*	*Two*	*Three*	*Four or More*
$80.00	$81.50	$83.00	$84.50	$86.00

Possible Reduction of Weekly Benefits

1.5 A percentage figure representing the financial position of the Plan will be calculated for each month, as described in 5.1, and will [9] determine whether the Weekly Benefits for each week ending in the month

are to be reduced. For any month when this percentage is 35% or higher, the Weekly Benefit will be paid in the amount determined by 1.0 through 1.4. When it falls below 35%, the Weekly Benefit will be reduced to the percentage of such amount indicated in the following table:

When the Financial Position Is:	*The Percentage Is:*
25% or more but less than 35%	60%
15% or more but less than 25%	30%

When the financial position of the Plan is less than 15%, no Weekly Benefits will be paid.

2. DURATION OF WEEKLY BENEFITS

Credit Units

2.0 The number of weeks for which an employee may receive Weekly Benefits depends on his number of credit units. An employee will be credited with the balance of his credit units as of December 31, 1968, under the Prior Plan, plus one-half a credit unit for each week thereafter in which he has any of the following hours:

a. Hours worked for the Company,

b. Hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance,

c. Hours not worked and not paid for but which were lost because:

(1) He was performing his duties as a member of the Grievance Committee, or President, Vice-President, Recording Secretary, Financial Secretary and/or Treasurer of a Local of the Union which is his collecting bargaining representative, or

[10] (2) He was absent because of disability for which benefits are payable under a Workmen's Compensation or Occupational Disease law or the Company Program of Insurance Benefits.

However, an employee will not receive credit for weeks occurring when he has 52 credit units, which is the maximum number he may have.

2.1 In the case of an employee employed on a Great Lakes vessel, credit units will be credited at seven-tenths per week instead of one-half per week but not more than 26 credit units shall be credited to him for any one calendar year.

Cancellation of Credit Units

2.2 An employee cannot receive any Weekly Benefit unless he has one or some fraction of a credit unit. If he has less than required to be cancelled as described in 2.3 he will receive a reduced benefit in proportion to his credit unit balance.

2.3 Normally one credit unit is cancelled for each Weekly Benefit paid. However, if a Weekly Benefit is reduced because of the receipt of other compensation (other than from the Company) only one-half credit unit will be cancelled for that Weekly Benefit.

2.4 If an employee willfully falsifies, or willfully withholds, any records or other data on which his Weekly Benefit payments are based, the Company may cancel any or all of his credit units.

2.5 Credit units will be cancelled whenever an employee incurs a break in continuous service. He will, thereafter, not be entitled to coverage by, or benefits from the Plan. However, any individual whose break in continuous service is removed shall have restored any credit units cancelled as a result of such break.

[11] 3. ELIGIBILITY FOR WEEKLY BENEFITS

Requirements

3.0 In order to be eligible for a Weekly Benefit, an employee must be on a layoff (as defined in 3.10) which occurred in a reduction in force or as a result of the permanent shutdown of a plant, department or subdivision thereof; he must have completed two years of continuous service prior to his layoff; and he must:

a. Report and apply in person in the week for which he is claiming a Weekly Benefit at a time and place designated by the Company. The place at which reporting and applying are required will be at or near the location where the employee was last employed. If such place is an unreasonable distance from the employee's residence, or if he leaves the area to seek work, the Company shall, upon request of the employee in person, grant permission to report at another Company location where an adequate office for such reporting is maintained. If no such office is within reasonable distance, the Company shall, upon request of the employee in person, grant permission to report and apply by mail. An employee applying for a Weekly Benefit pursuant to 3.1 may report and apply by mail. The necessary forms and instructions for making SUB applications by mail shall be supplied by the Company to the employee at the time his request for mail reporting is granted.

b. Receive a state unemployment benefit for the week. However, this requirement will not apply if he fails to receive that benefit only for one or more of the following reasons:

(1) He has exhausted his state unemployment benefits.

(2) He has other compensation in an amount which disqualifies him for a state unemployment benefit.

(3) He has not had sufficient employment to be covered under the state system.

(4) He is unable to work by reason of disability. (See 3.1.)

[12] (5) He is participating in a federal training program. (See 3.4.)

(6) He was laid off during a plant vacation shutdown and he was not entitled to vacation during the shutdown.

(7) He is an employee who was laid off from employment on a Great Lakes vessel and the week falls in a period of state system seasonal disqualification applicable to such an employee.

No employee shall receive a Weekly Benefit until he shows that he received a state unemployment benefit for the week or failed to receive such benefit for a reason which does not disqualify him from receiving a Weekly Benefit. This may be done by showing a state check or by some other method, which must reasonably provide for securing such proof. Examples of such methods are described in 7.10. If (7) above applies, the employee must comply with special administrative regulations of the Company, as to which he will be fully advised, necessitated by the greater difficulty of determining whether he is unemployed and qualified for benefits than would be the case if he were not under a state system seasonal disqualification.

c. Be available for work, and maintain an active registration with the state employment service. These requirements will be considered to have been met for any week for which the employee receives a state unemployment benefit.

d. Apply for, accept and not voluntarily leave employment with other employers as specified by the Company or otherwise, if the employment is considered suitable under the state system. This requirement will be considered to have been met for any week for which the employee receives a state unemployment benefit.

Disability

3.1 An employee who fails to receive a state unemployment benefit because he is not physically able to work shall receive a Weekly Benefit if he is otherwise entitled and if:

[13] a. He became disabled while on layoff and after sickness and accident coverage ceased under the Company Program of Insurance Benefits, and

b. He supplies the same certification of disability as would be required for sickness and accident benefits if such coverage had not ceased.

3.2 Any disability benefit paid under or pursuant to state or federal law with respect to the period for which a Weekly Benefit is paid under 3.1 shall for the purposes of 1.3 and 1.4 be considered to be a state unemployment benefit.

3.3 An employee will not be disqualified from a Weekly Benefit on the basis that he is not "on layoff" if he is recalled from layoff and is not physically able to perform the job to which recalled.

Federal Training Programs

3.4 If an employee does not receive a state unemployment benefit solely because he is participating in a training program established under or pursuant to federal law, he shall be entitled to a Weekly Benefit if otherwise eligible. In such case any income received by him under that program is a state unemployment benefit.

Disqualification

3.5 An employee will be disqualified from receiving a Weekly Benefit if:

a. He quit, or

b. He was suspended or discharged, or

c. His unemployment was a consequence of:

(1) any strike, slowdown, work stoppage, picketing or concerted action involving persons employed by the Company and covered by the Plan or members of a union which is the collective bargaining agent of the applicant, whether at any operation of the Company or elsewere, or

[14] (2) any strike, slowdown, work stoppage, picketing or concerted action at any operation of the Company, or of any labor dispute of any kind involving persons employed by the Company, when such action interferes with production or the ingress or egress of material or product at the operation where the layoff occurs, or

(3) any strike, slowdown, work stoppage, picketing or concerted action or any labor dispute of any kind involving persons employed by transportation or utility companies which directly interferes with production or the in-

gress or egress of material or product at the operation where the layoff occurs, or

d. His unemployment was the result of a refusal by him to accept assignment to any work at the operation where he was employed or at any other operation of the Company if it is work which he would be required to accept under any applicable labor agreement.

Waiting Weeks

3.6 Most states impose a "waiting week" for which no state unemployment benefit is paid. No Weekly Benefit will be paid for such a week, since in order to qualify for a Weekly Benefit, an employee must, under 3.0b., receive a state unemployment benefit or fail to receive that benefit for one or more of certain specified reasons. Should the parties determine that a second waiting week in a benefit year has been hereafter imposed in any state, an employee will, if otherwise eligible, receive a Weekly Benefit for that week.

Effect of Vacations

3.7 An employee may receive a Weekly Benefit only if he was not scheduled to be, or was not on, paid vacation; provided that if a layoff coincides in part or in whole with a scheduled vacation period, an employee will be considered to be on layoff only for any [15] part of such period with respect to which he is not entitled to receive vacation pay.

Ineligibility

3.8 a. An employee may not receive a Weekly Benefit for any week:

(1) For which he claims and is eligible for sickness and accident or total disability benefit (except as provided in 3.1) whether it is publicly or privately financed or a pension or retirement benefit financed in whole or in part by the Company, or

(2) When he is in the military service, including training encampments.

b. An employee may not receive a Weekly Benefit for any week when his layoff was the result of:

(1) Any war or hostile action of a foreign power, or

(2) Government regulations or control, over amount or kind of material or product which the Company may use or sell, or

(3) Sabotage or insurrection.

c. An employee may not receive a Weekly Benefit for any week of layoff which is the result of an Act of God after the first two weeks of layoff resulting from such cause.

3.9 If an employee fails to take all steps necessary to become eligible for a Weekly Benefit within 6 months of the date the application is made, the application shall thereupon become void unless the reason for failure to complete such steps in such time is a pending dispute concerning a state unemployment benefit determination or is the fault of the Company.

Meaning of "on Layoff"

3.10 For the purposes of the Plan, an employee is "on layoff" for any week in which, because of lack of work, he does not work at all for the Company.

[16] 4. SHORT WEEK BENEFITS

Eligibility

4.0 An employee (other than a salaried employee who is guaranteed compensation for a minimum number of hours per week or per pay period) having two or more years of continuous service at or before the end of the week in question will receive a Short Week Benefit for any week in which some, but less than 32, hours are worked for the Company, unless the sum of the hours described in 4.3 equals or exceeds 32.

4.1 Each day of jury or witness duty, funeral leave or annual military encampment, for which an allowance is payable by the Company, shall be deemed to be eight hours worked.

4.2 If an employee whose regular turn ends at the end of a payroll week is required to work beyond the end of the turn for four hours or less, such hours will be considered as worked in the payroll week in which his regular turn falls rather than in the next payroll week. If an employee whose regular turn starts at the beginning of a payroll week is required to report four hours or less before the beginning of the turn, such hours will be considered as worked in the payroll week in which his regular turn falls rather than in the preceding payroll week.

Benefit Amount

4.3 A Short Week Benefit for a particular week will be calculated by multiplying the employee's standard hourly wage rate (the wage rate applicable to hours worked on a nonincentive job) by the excess of 32 hours over the sum of the hours:

a. He worked in the week,

b. He did not work but for which he was paid by the Company.

c. He did not work for reasons other than lack of work, and

d. He did not work for the reasons specified in 3.5a., b., or c.

4.4 [17] For the purposes of 4.3, the employee's standard hourly wage rate will be the average such rate in the week for which the Short Week Benefit is paid.

4.5 An employee will be deemed to have received pay for an unworked Holiday if he failed to receive such pay and his failure to receive it was solely for reasons other than work not having been performed in the appropriate pay period or periods.

4.6 For any week (seven consecutive days) of vacation overlapping two payroll weeks, the employee will be deemed to have been paid for hours equal to one-fifth of the hours of vacation pay for that week on each of the first five days of that week.

4.7 If the employee applies for a state unemployment benefit for any portion of the week, he must notify

the Company of such application and of the total amount of any such benefit received. One-seventh of the amount of such state unemployment benefit will be deducted from the amount calculated in accordance with 4.3 for each day of the state benefit week which falls within the payroll week for which the Short Week Benefit is paid.

4.8 The reduction table in 1.5 shall apply to Short Week Benefits.

Payment of Benefit

4.9 A Short Week Benefit will be paid to the employee, without application by him, for any week for which he qualifies.

Cancellation of Credit Units

4.10 One-half credit unit will be cancelled for each Short Week Benefit except that seven-tenths of a credit unit will be cancelled in the case of an employee who is employed on a Great Lakes vessel.

4.11 If an employee willfully falsifies, or willfully withholds, any records or other data on which his Short Week Benefit payments are based, the Company may cancel any or all of his credit units.

[18] 5. FINANCING AND ADMINISTRATION

5.0 All Benefits are provided solely out of the Fund. The Company's obligation to contribute to the Fund, for the provision of Benefits, is established by agreements with unions representing employees covered by the Plan. The details concerning the Company's obligation, including the maximum obligation incurred for each hour worked by a covered employee and the level of finances established for the provision of Benefits, are contained in the agreement between the Company and the union representing the majority of covered employees.

5.1 Under the agreements referred to, a relationship is determined, for each benefit month, between the level of financing established for the provision of Benefits and the actual financing (the Fund and the

accumulated Company obligation) then available. That relationship, expressed as a percentage, is the financial position of the Plan, used for the determination required by 1.5.

5.2 Any amount of Company obligation arising under the agreements referred to shall remain as an obligation of the Company for the purpose of providing Benefits, unless reduced, pursuant to the agreement with the union representing the majority of covered employees, because of the provision of other benefits for employees.

5.3 The Company shall administer the Plan. The Company's procedures and regulations shall be in accordance with and subject to the terms and provisions of the Plan. The costs of administering the Plan shall be borne by the Company and shall not be paid from the Fund.

6. DISPUTES

6.0 If an employee disagrees with any determination relating to his eligibility to a Benefit or the amount thereof, he should discuss the matter with a Company representative at the office at which [19] he applies for Benefits. If the dispute is not resolved by that discussion, he must file an SUB grievance (or a written request for review if he is not in a bargaining unit) on a form provided by the Company, within 30 days of the notice of denial or Benefit payment to which the disagreement applies or within 60 days of the end of any week as to which eligibility for a Short Week Benefit is in dispute. If he does not file such a grievance (or request), the original determination will be final and conclusive.

6.1 Even though the determination with which an employee disagrees may apply to more than one week, he should continue to report and apply for each week as to which he claims a Weekly Benefit but he need not file repetitious greivances (or requests for review).

6.2 If an employee's eligibility to a Weekly Benefit depends on his eligibility to a state unemployment benefit and his eligibility to a state unemployment

benefit is in dispute, the determination of his eligibility for the Weekly Benefit will be postponed until the question is resolved under the state system. At that time a retroactive determination will be made to place him in the same position as he would be in if the determination could have been made promptly upon his application. Nevertheless, he must continue to report and apply each week for which he claims a Weekly Benefit. While the dispute is pending, his credit unit balance and the Fund balance will be treated as though the Weekly Benefit had been paid.

7. MISCELLANEOUS

Coverage

7.0 An employee is covered by the SUB Plan only if he is in a group of employees of the Company who are designated for such coverage. An employee cannot receive any Weekly Benefit or relocation allowance unless he is covered by the Plan at the time his layoff [20] commences and cannot receive a Short Week Benefit unless he is covered by the Plan in the week in question.

Relocation Allowance

7.1 Relocation allowances shall be payable under the Plan in accordance with the eligibility provisions contained in applicable labor agreements.

Military Service

7.2 If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law.

Nonduplication

7.3 An employee is not eligible to receive a Weekly or Short Week Benefit if he receives, or is eligible to re-

ceive, a similar benefit under an arrangement provided by an employer with whom he has more service than with the Company.

Tax Withholding

7.4 Any Benefit an employee is entitled to receive will have deducted from it any amount the Company is required to withhold by reason of any law or regulation of any federal, state or municipal government. Current rulings of the Internal Revenue Service do not require withholding of federal income tax from a Benefit but they do require that Weekly and Short Week Benefits be reported as income on the employee's annual income tax return.

Non-alienation

7.5 No Benefit shall be subject in any way to alienation, sale, transfer, assignment, pledge, attachment, garnishment, execution, or encumbrance [21] of any kind, and any attempt to accomplish the same shall be void. If the Company shall find that such an attempt has been made with respect to any Benefit due or to become due to an employee the Company in its sole discretion may terminate his interest in such Benefit and apply the amount of such Benefit to or for the benefit of him, his spouse, parents, children or other relatives or dependents, as the Company may determine, and any such application shall be a complete discharge of all liability with respect to such Benefit.

Death or Incapacity

7.6 Except as provided in 7.5 any Benefits to which an employee may become entitled shall be payable only to him, except that if, after becoming entitled to Benefits but before they are paid, he dies or becomes unable to manage his affairs for any reason, any Benefits then payable to him shall be paid to his duly appointed legal representative, if there be one, and, if not, to his spouse, parents, children, other relatives or dependents or, if there are none such, to his creditors, as the Company in its discretion may determine. Any payment so made shall be a complete discharge of any liability with respect to such Benefit. In the case of an employee's death, no Weekly Benefit

shall be payable with respect to any period following the last full week of layoff immediately preceding his death.

Effect on Other Rights

7.7 When an employee receives Benefits under the Plan he shall not by reason thereof be deemed to be working for the Company during such period, nor shall he by reason thereof receive benefits under any other benefit plan to which the Company contributes other than those to which he would be entitled if he were not receiving Benefits.

An employee's rights and the Company's right to discharge him shall not be enlarged or affected by reason of the Plan. Nothing [22] contained in the Plan shall be deemed to enlarge, qualify, limit, or alter in any manner the Company's management responsibilities.

Finality of Determination

7.8 The Company shall have the right to recover overpayments for the Fund and correct underpayments to employees. However, any benefit determination shall become final six months after the date on which it is made if (a) no dispute is then pending, and (b) the Company has not theretofore given notice in writing of an error. The foregoing shall not be construed to prevent the Company from making a new benefit determination when it learns of facts of which it did not have and could not have had knowledge at the time of a prior benefit determination or in a case as to which the prior benefit determination was the result of information fraudulently furnished or withheld by the employee.

Part-Time Employees

7.9 a. The calculation provided in 1.0 will be made by use of a number in place of 26 which bears the same relation to 26 as the number of hours in his normal work week bears to 40, and

b. There shall be substituted for the number 32 wherever it appears in 4.0 and 4.3 a number equal to 80% of the number of regular weekly hours of work of such employee.

Receipt of State Unemployment Benefit

7.10 Following are examples of methods which may be used by an employee to prove receipt of a state unemployment benefit:

a. A state unemployment benefit check, or in California, a cash payment receipt issued by the state system agency.

b. A form satisfactory to the Company issued by the state system agency.

[23] c. In states which do not furnish a form as provided in b. but which do provide the Company with a current and itemized account of unemployment benefits paid and charged to the Company's experience rating account under the state system, the employee's signed statement under information provided on the application showing:

(1) The amount of state unemployment benefit paid.

(2) The week ending date or other identification of the week covered by the state unemployment benefit payment.

(3) The date of the state unemployment benefit check.

(4) The number of the check covering the state unemployment benefit payment.

This can be used only if, under the state system and with respect to the state unemployment benefit in question, the accounting for benefits paid and charged to the Company experience rating account under the state system is provided on a reasonably current basis and shows each benefit payment as a separate item, identifies the employee receiving the payment, and shows the amount paid and the week ending date or other identification of the week covered by the payment.

d. In instances where there is no form as provided in b. or where there is no current and itemized accounting of benefits paid, as outlined in c., or, in the Company's discretion, as an alternate to c., the following evidence may be used:

(1) A photostat copy of the state check; or

(2) A certification by a Notary Public, verifying the receipt of a state unemployment benefit.

e. The above list is illustrative and is not intended to exclude other local arrangements which reasonably provide for securing proof.

[24] *Coinciding Weeks*

7.11 a. For any week which does not constitute a payroll week and as to which an employee fails to qualify for a Weekly Benefit solely because there are days in that week which coincide with days in a payroll week and (1) he worked on one or more such coinciding days or (2) he is entitled to a Short Week Benefit for such payroll week, he will receive a Weekly Benefit as set forth in b. and c.

b. For the purposes of a. and subject to c., the Weekly Benefit will be calculated in the normal manner; i.e., all compensation applicable to the week shall be regarded as other compensation and the state unemployment benefit paid for the week will be deducted irrespective of the fact that some or all of the compensation may be applicable to the payroll week or that some portion of the state unemployment benefit may be deducted from a Short Week Benefit.

c. In any case covered by a. in which the employee worked or was paid for a total of less than 32 hours in the payroll week, the Weekly Benefit shall be reduced by one-seventh for each day of the week which coincides with a day of the payroll week.

COLLECTIVE BARGAINING AGREEMENT
between REPUBLIC STEEL
CORPORATION and
UNITED STEELWORKERS UNION

ARTICLE TEN—SENIORITY

ARTICLE TEN—SENIORITY

SECTION 1—PROMOTIONS AND LAYOFFS

The parties recognize that promotional opportunity and job security in event of promotions, decrease of forces, and recalls after layoffs should increase in proportion to length of continuous service, and that in the administration of this Section the intent will be that wherever practicable full consideration shall be given continuous service in such cases.

In recognition, however, of the responsibility of Management for the efficient operation of the plants, it is understood and agreed that in all cases of:

(a) promotion (except promotions to positions excluded from the bargaining unit set forth in this Agreement), the following factors as listed below shall be considered; however, only where factors (a) and (b) are relatively equal, shall length of continuous service be the determining factor:

(a) ability to perform the work;

(b) physical fitness;

(c) continuous service.

(b) decrease in forces or recalls after layoffs, the following factors as listed below shall be considered; however, only where both factors (a) and (b) are relatively equal, shall continuous service be the determining factor:

(a) ability to perform the work:

(b) physical fitness;

(c) continuous service.

Nothing in this Section shall prevent Plant Management and the Grievance Committee from mutually agreeing to fill an equal or lower job in a promotional sequence with a senior Employee; nor from executing an agreement in writing to provide an opportunity to any Employee displaced in the course of a reduction of forces from exercising his seniority to the extent appropriate to obtain a job paying higher earnings; provided such Employee is otherwise qualified with respect to relative ability to perform the work and relative physical fitness as provided above. Plant Management and the Grievance Committee may mutually agree to provide

training for Employees disabled in the plant and to assign them to vacancies for which they are qualified on the basis of such seniority arrangements as they may determine.

SECTION 2—UNITS

Seniority units, job progression and regression charts and rules and regulations governing their application, to which the factors referred to in Section 1 of this Article Ten shall be applied, have been mutually agreed upon by Plant Management and the Grievance Committee at many of the plants. Such agreements shall remain in effect unless and until modified by local written agreement signed by Management and the Chairman and Secretary of the Grievance Committee of the Local Union. Hereafter, local seniority agreements, including agreements covering departments or units thereof, shall be signed on behalf of the Union by the Chairman and Secretary of the Grievance Committee of the Local Union, and shall be posted in the plant.

In any case in which local agreement cannot be consummated as to the seniority unit in which a new job or new jobs, including those in new, merged or transferred operations, are to be placed, Management shall include such job or jobs in the most appropriate seniority unit or, if more appropriate, establish a new seniority unit, subject to the complaint and grievance procedure of this Agreement.

SECTION 3—CONTINUOUS SERVICE RECORD

The continuous service record of any Employee shall be determined as follows:

(a) Each present Employee shall have such continuous service record as is shown on the employment records of the Company for such Employee, and he shall accumulate additional continuous service in accordance with Subparagraph (c) below, until his continuous service record shall be broken in which event his continuous service record shall end and be cancelled. All continuous service dates posted pursuant to Section 3 of Article Eleven—Seniority—of the April 30, 1947 Agreement and about which no grievance was filed as therein provided shall continue to be conclusively considered as correct.

(b) Each new Employee and each person rehired after the cancellation of his continuous service record shall accumulate continuous service from the date of such hiring or rehiring, as the case may be, in accordance with Subparagraph (c) below, until his continuous service record is broken, in which event his continuous service record shall end and be cancelled.

(c) The rules for determining a break in a continuous service record, which were first adopted at each separate unit on the date of its first labor agreement and as subsequently amended in the respective labor agreements since that time, and which shall have no application at each separate unit prior to that respective time, shall continue to be used to determine the occurrence of a break in a continuous service record prior to August 1, 1968. From August 1, 1968, forward, the following rules shall be used to determine a break in a continuous service record:

(1) Voluntarily quitting the service;

(2) Discharge from the service, provided that if the Employee is rehired within 6 months the break in continuous service shall be removed;

(3) Termination in accordance with Article Fourteen—Severance Allowance;

(4) Absence in excess of 2 years, except as provided in Subparagraph (5) below; or

(5) Absence due either to layoff or physical disability, or both, which continues beyond the period specified in this Subparagraph (c)(5). If an Employee is absent because of layoff or nonoccupational physical disability, or both, in excess of two years, he shall continue to accumulate continuous service during such absence for an additional period equal to (i) 3 years, or (ii) the excess, if any, of his length of continuous service at commencement of such absence over 2 years, whichever is less. Any accumulation in excess of 2 years during such absence shall be counted, however, only for purposes of this Article Ten, including local agreements thereunder, and shall not be counted for any other purpose under this or any other agreement between the Company and the International Union. In order to avoid a break in service within the above period after an absence in excess of 2 years, an Employee absent

because of layoff or nonoccupational physical disability, or both, must report for work promptly upon termination of either cause, provided, in the case of layoff, the Company has mailed a recall notice to the last address furnished to the Company by the Employee. An Employee absent because of a compensable disability incurred during the course of employment shall accumulate continuous service, provided such person is returned to work within 30 calendar days after the end of the period for which he is unemployed and for which workmen's compensation is payable to him.

SECTION 4— PROBATIONARY EMPLOYEES

New Employees and those hired after a break in continuity of service will be regarded as probationary Employees for the first 260 hours of actual work and will receive no continuous service credit during such period. Probationary Employees may initiate complaints under this Agreement but may be laid off or discharged as exclusively determined by Management. Probationary Employees continued in the service of the Company subsequent to the first 260 hours of actual work shall receive full continuous service credit from date of original hiring.

SECTION 5— INTERPLANT AND INTRAPLANT TRANSFERS

It is recognized that conflicting seniority claims among Employees may arise when plant or department facilities are created, expanded, added, merged, or discontinued, involving the possible transfer of Employees. It is agreed that such claims are matters for which adjustment shall be sought between Management and the appropriate grievance representatives or committees.

In the event the above procedure does not result in agreement, the International Union and the Company may work out such agreements as they deem appropriate irrespective of existing seniority agreements or may submit the matter to arbitration under such conditions, procedures, guides and stipulations as to which they may mutually agree.

SECTION 6—TEMPORARY VACANCIES

In the case of a temporary vacancy exceeding 5 days involving temporary reassignment of Employees within a

seniority unit, the Company shall, to the greatest degree consistent with efficiency of the operation and safety of Employees, fill such vacancy by assigning thereto the Employee whose continuous service or progression chart standing entitles him to the next consideration for promotion to such job. Any time spent in filling such temporary vacancy of 5 days or less shall not be used to the detriment of himself or of other Employees when making a selection to fill a permanent vacancy.

SECTION 7—DISTRIBUTION OF WORK

In the event a decrease of work, other than decreases which may occur from day to day, results in the reduction to an average of 32 hours per week for the Employees in the seniority unit and a further decrease of work appears imminent, which in the Company's judgment may continue for an extended period and will necessitate a decrease of force or a reduction in hours worked for such Employees below an average of 32 hours per week, the Management of the plant and the Grievance Committee will confer in an attempt to agree as to whether a decrease of force shall be effected in accordance with this Article Ten or the available hours of work shall be distributed as equally among such Employees as is practicable with due regard for the particular skills and abilities required to perform the available work. In the event of disagreement, Management shall not divide the work on a basis of less than 32 hours per week.

SECTION 8—FILLING OF VACANCIES

When a vacancy (other than a temporary vacancy) develops, or is expected to develop, in the promotional line in any seniority unit, Management shall, to the greatest degree practicable, post notice of such vacancy or expected vacancy, or job assignments where such is the present practice, for such period of time, in such manner, and at such places as may be appropriate at each plant.

Employees in the seniority unit who wish to apply for such vacancy or expected vacancy may do so in writing in accordance with rules developed by Management at each plant.

Management shall, if in its judgment there are applicants qualified for such vacancy or expected vacancy, fill same from among such applicants in accordance with the provisions of Sections 1 and 2 of this Article Ten.

SECTION 9—UNION OFFICERS

When Management decides that the work force in any seniority unit in any plant is to be reduced, the member of the plant Grievance Committee, if any, in that unit shall, if the reduction in force continues to the point at which he would otherwise be laid off, be retained at work and for such hours per week as may be scheduled in the work area in which he is employed, provided he can perform the work of the job to which he must be demoted. The intent of this provision is to retain in active employment the plant grievance committeemen for the purpose of continuity in the administration of the labor agreement in the interest of Employees so long as a work force is at work; provided that no grievance committeeman shall be retained in employment unless work which he can perform is available to him in the designated work area which he represents. The Local Union shall designate and advise the Company of such area of representation.

This provision shall apply also to Employees who hold any of the following offices in the Local Union or Unions in which the Employees of the plant are members: President, Vice President, Recording Secretary, Financial Secretary, and Treasurer.

SECTION 10—LEAVES FOR UNION BUSINESS

Leaves of absence for the purpose of accepting positions with the International or Local Unions shall be available to a reasonable number of Employees. Adequate notice of intent to apply for leave shall be afforded local Plant Management to enable proper provision to be made to fill the job to be vacated.

Leaves of absence shall be for a period not in excess of one year and may be renewed for a further period of one year.

Continuous service shall not be broken by the leave of absence but will continue to accrue.

SECTION 11—CONTINUOUS SERVICE LISTS

The Company shall make available to the Local Union concerned lists showing the relative continuous service of each Employee in each seniority unit. Such lists shall be revised by the Company from time to time, as necessary, but at least every 6 months, to keep them reasonably up to date. Except

as provided in Section 3 of this Article Ten, the seniority rights of individual Employees shall in no way be prejudiced by errors, inaccuracies, or omissions in such lists.

SECTION 12—SENIORITY POOLS

A. Purpose

The purpose of this Section 12 is to increase intraplant job security for longer-service Employees. The application of seniority provisions other than those established under this Section 12 to jobs in a seniority unit shall not be affected by the inclusion of such jobs in the pool except to the extent necessary to comply with the provisions of this Section 12.

B. Establishment of Seniority Pools

It is the objective of the parties that there shall be at each plant the minimum number of seniority pools as described below consistent with the efficient operation of the plant. As a minimum, the agreed upon area covering a single seniority pool in each case shall be as broad as practicable and in no event shall be less than a major operating unit such as Blast Furnace, Coke Plant, Open Hearth, etc.; however, rolling facilities need not necessarily be considered as one unit but shall nevertheless be as broad as practicable. For manufacturing plants the area shall be as broad as practicable but shall in no event be less than a substantial portion of a plant.

Each seniority pool within an agreed upon area as established or revised pursuant to the above objectives shall be regarded as being a single seniority pool for the purposes of layoff and recall. Each such pool shall be made up of all jobs in Job Classes 1, 2, and 3, and such jobs in Job Class 4 or higher as shall be agreed upon by the local parties. The number of jobs in Job Class 4 or higher to be included in the pool shall be no less than two-thirds of the total number of Job Class 4 jobs in the agreed upon area. The job opportunities provided by the jobs in Job Class 4 or higher included in the pool as of the pay period including the 90th day after the effective date of this Agreement shall be approximately two-thirds of the job opportunities provided by all Job Class 4 jobs in the agreed upon area as of such date. If a particular job required to be included in the pool by the

foregoing provisions is inappropriate for inclusion in the pool, the local parties may agree to remove it from the pool provided that another suitable job (or jobs) is concurrently added to the pool which does not reduce significantly the number of job opportunities provided by the job which was removed from the pool. The jobs in the pool shall also be included in appropriate seniority units for the application of seniority provisions other than those included in this Section 12.

C. Operation of a Seniority Pool

An Employee who, at the time he is or otherwise would be laid off, has 2 or more years of plant continuous service shall be assigned to a job for which he is qualified in his seniority pool, if a job in his seniority pool is held by an Employee having less plant continuous service; provided, however, that Management shall not be required to assign him to any such job before the expiration of 30 days (or such shorter period as may have been heretofore agreed upon by the local parties) after the date of his layoff. In filling other than temporary vacancies in jobs in any seniority pool, Management will recall Employees laid off from the seniority units covered by the pool in the order of their plant continuous service; however, the Employee must be qualified to perform the job. Where practicable, however, Management will make a reasonable effort to assign, on the basis of plant continuous service, an Employee laid off from his seniority unit to a pool job he prefers which is not held by an Employee with unit service. However, Management shall have the right, to the extent necessary, to designate the specific job in any pool to which an Employee shall be assigned (and to change such assignments) in order to provide jobs for longer-service Employees who would otherwise be unable to qualify for an available job in the pool. In order to maintain efficiency, Management need not assign laid off Employees to a job in any operating or service unit where such assignment would result in less than the required minimum of experienced Employees in such unit. The local parties may by agreement determine whether there are circumstances under which an Employee need not accept a pool job.

D. Operation of Multiple Seniority Pools

In a plant in which there is established more than one

agreed upon area as defined in Subsection B above, the following shall apply:

In the event of a permanent shutdown of a facility as defined in Article Fourteen—Severance Allowance—or layoff of one or more Employees for a period which extends for 6 months or more or which the parties believe will extend for such a period, an Employee affected who has 2 or more years of plant continuous service at time of layoff shall be given the right to a job in any seniority pool in the plant if a job in that pool is held by an Employee with less plant service provided he is qualified to perform the job. Such assignments to jobs shall be subject to the same rules as apply in Subsection C above. An Employee who has been assigned to a job in a different seniority pool under this provision and who has been subsequently laid off from that pool shall have recall rights to that pool until he is recalled to a job in the agreed upon area from which he was originally laid off; provided, however, that such recall rights shall be limited to his own pool and the last pool from which he was laid off; and provided, further, that the Company shall not be required under this Subsection D to displace a shorter service Employee with such laid off Employee before the expiration of 30 days after the date of any such layoff.

E. Unit Seniority

An Employee who is assigned to a pool job in a different seniority unit pursuant to Subsections C or D above shall accrue unit service in that seniority unit as well as in his regular seniority unit provided that such unit service will be cancelled when he is recalled to his regular seniority unit or when he is reassigned to another seniority unit; and provided, further, that such Employee, to be eligible for advancement to a job above the pool in the unit to which he is assigned pursuant to Subsections C or D above, shall have the same qualifications as are required for transfer pursuant to the provisions of Section 15, Subparagraph (b), of this Article Ten.

F. Miscellaneous

(1) Employees shall be recalled directly to jobs in their seniority units or promotional sequences above the seniority pool, if that is in accord with applicable seniority practices or agreements.

(2) If the Company recalls the wrong Employee from a layoff to a job in a pool, it will not be liable for any retroactive pay to the Employee who should have been recalled with respect to any period prior to 4 days or the beginning of the workweek, whichever is later, after receipt by the Company of specific written notice by him (on a form to be provided therefor) of its alleged error.

(3) If the local parties deem it helpful in facilitating the assignment of Employees in the pool, they are empowered to agree in writing that schedule changes arising from movements of Employees into, within or out of the seniority pools in accordance with the provisions of the Section 12 shall be deemed not to be, even though it otherwise would be, a violation of the provisions relating to schedule changes and shall not provide a basis for a claim for sixth or seventh day overtime compensation or reporting allowance.

SECTION 13—INTERPLANT JOB OPPORTUNITIES

A. An Employee of a steel plant or of a manufacturing plant continuously on layoff for 60 days or more who had 2 or more years of Company continuous service on the date of his layoff and who is not eligible for an immediate pension and social security shall be given priority over other applicants (new hires, including Employees with 60 days or less service) for job vacancies (other than temporary vacancies) at other steel or manufacturing plants of the Company located within limited agreed upon geographical regions (hereinafter referred to as "region") and covered by an agreement between the Company and the International Union, all in accordance with the following:

(1) The plants within each such agreed region are set forth in Appendix C to this Agreement.

(2) The job vacancies for which Employees shall be eligible under these provisions shall be only those that are not filled from the particular plant in accordance with the provisions of this Article Ten.

(3) An Employee shall be given such priority only if he files with the Management of the plant from which he is laid off a written request for such employment

specifying the other plant or plants at which he would accept employment. Such application shall be on a form provided by the Company.

(4) Employees who thus apply may thereafter be given priority in the filling of job vacancies (other than temporary vacancies) over new hires, and after they have been continuously on layoff for 60 days and have had an application on file for 30 days shall be given such priority in the order of their Company continuous service (the earliest date of birth to control where such service is identical), in each case provided such Employees have the necessary qualifications to advance in the promotional sequence involved. In determining the necessary qualifications to advance in the promotional sequence involved the normal experience acquired by Employees in such sequence shall be taken into consideration. It is recognized that there are circumstances under which it is impractical to afford such priority to an applicant because of the imminence of his recall to his home plant. In such a case, the Company shall not incur liability for failure to give priority to such applicant, if the period does not exceed two weeks or such longer period as may be agreed to by the Employee. An Employee who is otherwise eligible for employment shall not be required to meet higher medical qualifications at another plant than would have been required of him upon recall at his home plant.

(5) An Employee laid off from one plant who is offered and who accepts a job at another plant in accordance with the foregoing provisions will have the same obligation to report for work there as though he were a laid off Employee at that plant. During his employment at that plant he will be subject to all the rules and conditions of employment in effect at that plant. He will be considered as a new Employee at that plant for all purposes except that the provisions of Section 4 of this Article Ten will not be applicable, and his plant continuous service for determining his seniority for purposes of promotion, decrease in forces, or recalls after layoff at that plant shall be no less than his continuous employment at that plant plus 60 days. At any time during the first 30 days of his employment at that plant he may elect to termi-

nate such employment without affecting his continuous service at his home plant provided he gives reasonable notice to Plant Managment and provided further that such an election will affect his right to further consideration under this Section 13 in the same manner as if he had rejected a job offered to him. If he is laid off from that plant his continuous service at that plant will be cancelled when he is recalled to his home plant, subject to the provisions of Subparagraph (7) below, or when he is employed at any other plant of the Company. If his home plant is closed permanently, his continuous service at that plant will be cancelled and the plant to which he was assigned will become his home plant, subject to the election provided in the following sentence. If his home plant is closed permanently or if his home plant department or substantial portion thereof is permanently discontinued, and the Employee has less than two years of continuous service for layoff purposes at the new plant and meets the eligibility requirements for severance allowance, he may elect within 90 days of such closing or discontinuance to be assigned back to his former home plant for the purpose of receiving severance pay and thus terminating his continuous service with the Company for all purposes under this Agreement.

(6) If an Employee rejects a job offered to him under these provisions, or if he does not respond within 5 days of the time the offer is made, directed to his last place of residence as shown on the written request referred to in Subparagraph (3) above, his name shall be removed from those eligible for priority hereunder, and he may thereafter apply, pursuant to Subparagraph (3) above, for reinstatement; provided, however, that he shall be entitled to only one such reinstatement during the period of one year after such unaccepted offer unless he is recalled to active employment and again laid off during the one-year period after such unaccepted offer.

(7) An Employee who accepts employment at another plant under these provisions will continue to accrue continuous service for seniority purposes at his home plant in accordance with the applicable seniority rules. If he is recalled to work at his home plant:

(a) He shall have an option to stay or return unless Management directs him to return, in which event his continuous service will continue to accrue for seniority purposes at the other plant until the expiration of one of the following applicable periods if he has not returned to employment at the other plant by that time.

The periods are as follows:

If recalled to a Job Class 10 or below job at his home plant, 6 months;

If recalled to a Job Class 11 through 18 job at his home plant, one year;

If recalled to a Job Class 19 or above job at his home plant, 1½ years;

If promoted to a higher job classification after his recall to his home plant, any longer period of seniority accrual at the other plant as determined by one of the periods above shall apply as of the date of his initial recall to the home plant;

at the expiration of which period it will be cancelled if he has not returned to employment at the other plant. At any time within the period specified above, Management at the home plant may give the Employee the option of returning to the other plant. If the Employee elects to return to the other plant, his continuous service at his home plant shall be cancelled.

(b) If Management makes his return to his home plant optional and he elects to return, his continuous service for seniority purposes at the other plant will be cancelled.

(c) If Managment makes his return to his home plant optional and he elects to remain at the other plant, his continuous service for seniority purposes at his home plant will be cancelled.

(8) When an Employee is recalled to his home plant from another plant, and Management at such other plant has sound reason for not immediately releas-

ing such Employee, the Employee may be retained at such other plant without penalty for the calendar week following the calendar week in which such recall occurs. If the Employee is retained beyond this period for the convenience of Management at such other plant, he shall receive in addition to pay for the job performed, such special allowance as may be required to equal the earnings that otherwise would have been realized by the Employee on the job to which he was recalled by his home plant.

B. Priority in the filling of job vacancies (other than temporary vacancies) in steel plants or manufacturing plants in areas covering more than one region shall be afforded Employees in such plants in accordance with the following:

(1) Such priority shall be afforded to Employees who have applied for employment in the region from which laid off and Management has failed to provide employment and:

(a) Who have 2 or more years of Company continuous service at the date of shutdown and who (i) have elected not later than the end of 30 days from the date of shutdown to continue on layoff and (ii) cannot qualify for immediate pension and have not attained the age of 60 and (iii) have no employment and no recall rights to a job in the plant or in a regional plant in which they have been employed as a result of a permanent shutdown of a plant, department, or subdivision thereof and (iv) have applied for employment hereunder, or

(b) Who have 2 or more years of Company continuous service at the time of layoff from their plant and (i) in the opinion of Management are not likely to be returned to active employment in their plant or in a regional plant within one year from the date of layoff and (ii) cannot qualify for immediate pension and have not attained the age of 60 and (iii) within 30 days after being advised by Management of such option apply for employment hereunder.

(2) The plants within each such agreed interregional area are set forth in Appendix C to this Agreement.

(3) The job vacancies for which Employees shall be eligible under these provisions shall be only those that are not filled from the particular plant or the particular region in accordance with this Section 13 and the foregoing Sections of this Article Ten.

(4) In filling such job vacancies hereunder, the provisions of Subparagraphs (3), (4), (5), (6) and (7) of Subsection A of this Section 13 shall be applicable, except that the following additional provisions shall be applicable to an Employee assigned to another plant under the provisions of this Subsection B:

(a) He may, at any time during the first 6 months of his employment at that plant (or during a period of layoff in the first year of such employment), elect to terminate such employment without breaking his continuous service at his home plant, provided he gives two weeks' notice to Plant Management. If he does so elect to return to his home plant, he will not be eligible for a relocation allowance for such return.

(b) When he has completed one year of employment at that plant, his continuous service at his home plant will be cancelled and the plant to which he was assigned will then become his home plant.

(5) An Employee who is assigned a job under this Subsection B or Subsection A of this Section 13 in a plant at least 50 miles from the plant from which he was laid off and who changes his permanent residence as a result thereof will receive a relocation allowance promptly after the commencement of his employment at the plant to which he is relocated, in the following terms:

(a) He must make written request for such allowance in accordance with the procedure established by the Company.

(b) The amount of the relocation allowance will be determined in accordance with the following:

Miles Between Plant Locations	Allowance for Single Employees	Allowance for Married Employees
50- 99	$130	$380
100- 299	150	420
300- 499	180	490
500- 999	230	620
1,000-1,999	290	780
2,000 or more	350	940

(c) The amount of any such relocation allowance will be reduced by the amount of any relocation allowance or its equivalent to which the employee may be entitled under any present or future federal or state Legislation; and the amount of such allowance shall be deducted from monies owed by the Company in the form of pay, vacation benefits, SUB benefits, pensions or other benefits, if the Employee quits, except as it shall be agreed locally that the Employee had proper cause, or is discharged for cause any time during the 12 months following the start of such new job.

(d) Only one relocation allowance will be paid to the members of a family living in the same residence.

C. (1) The operation of this Section 13 will be subject to periodic review by a joint committee, consisting of equal numbers of representatives of both parties (not more than 3 each), who shall meet periodically to review the operation of this Section 13 and to consider and resolve any problems that may arise from its operation. The Company shall supply to such committee pertinent information relating to the operation of this Section 13.

(2) The following procedure shall apply only to complaints or grievances relating to the application of this Section 13:

(a) Any Employee who believes that he has a justifiable request or complaint shall promptly refer the matter to a Staff Representative designated by the Union for this purpose, who, in turn, will promptly arrange to discuss the request or complaint with the Company's designated representative.

(b) If not satisfactorily resolved, the Union's designated Staff Representative may refer the matter to the Company's Step 4 Representative certified to the Union by the Company to handle Step 4 grievances for the home plant of the complaining Employee, or, if appropriate, the Step 4 Representative for another plant involved in the complaint. Such referral shall be made in writing within 10 days of completion of the final discussion pursuant to Subparagraph (a) above and shall set forth the Union's statement of fact, the action of the Company which the Union challenges, the clause or clauses of this Section 13 which are alleged to be violated, the relief sought, and the Union's position. The appealed grievance shall be handled in the regular complaint and grievance procedure established under this Agreement starting at Step 4.

D. In order to facilitate the operation of the program provided for in this Section 13, it is agreed that (1) back pay shall not be awarded in any grievance based on those paragraphs unless the arbitrator finds that there has been willful and deliberate noncompliance therewith, and (2) the Company and the International Union may, upon recommendation of the committee provided for in Subsection C above, amend this Section 13 at any time during the period of this Agreement and that such amendment shall be effective with respect to any pending grievance.

E. The Company will not be liable for any retroactive pay with respect to any period prior to 4 days or the beginning of the workweek, whichever is later, after receipt by the Company of specific written notice (on a form to be provided therefor) of its alleged error.

F. By agreement between the Company and the International Union the provisions of this Section 13 may at any time be suspended and Employees who are working at other plants under these provisions may be laid off, if it becomes necessary to do so to provide employment for long-service Employees who are permanently displaced or for other valid reasons.

SECTION 14—MANNING OF NEW FACILITIES

A. In the manning of jobs on new facilities in existing plants, the jobs shall be filled by qualified Employees who apply for such jobs in the order of length of service from the following categories in the following order but subject to the other provisions of this Section 14:

(1) Employees displaced from any facility being replaced in the plant by the new faciliites;

(2) Employees being displaced as the result of the installation of the new facilities;

(3) Employees presently employed on like facilities in the plant;

(4) Employees presently on layoff from like facilities in the plant;

(5) Employees in the plant with 2 or more years of plant continuous service, provided that if sufficient qualified applicants from this source are not available, Management shall fill the remaining vacancies as it deems appropriate.

B. The local parties shall meet to seek agreement on whether the length of service considered shall be plant service, department service, unit service or job service, and on the standards to be used to determine the qualifications entitling Employees otherwise eligible to be assigned to the jobs in question. It shall be the objective of such meetings to reach agreements on manning which reflect the parties' mutual intent to facilitate efficient manning and preserve job security for longer service Employees.

C. Should the local parties fail to agree on the standards for determining qualifications, an applicant otherwise eligible shall have:

(1) The necessary qualifications for performing the job.

(2) The ability to absorb such training for the job as is to be offered and is necessary to enable the Employee to perform the job satisfactorily.

(3) The necessary qualifications to progress in the promotional sequence involved to the next higher job to the extent that Management needs Employees for such progression. In determining the necessary

qualifications to advance in the promotional sequence involved, the normal experience acquired by Employees in such sequence shall be taken into consideration. However, it is recognized that Management can require that a sufficient number of occupants of each job in a promotional sequence be available to assure an adequate number of qualified replacements for the next higher job.

D. An applicant who is disqualified under Subsection C above shall have the right to apply for another job for which he believes he can qualify.

E. When new facilities are to be manned pursuant to this Section 14, the local parties shall meet and may establish, in appropriate circumstances, rules for allowing an Employee not placed initially a second opportunity to elect transfer to the new facility consistent with its efficient operation. In establishing such rules, the local parties shall consider matters such as:

(1) The job level in the promotional sequence in the new unit up to which an Employee will be allowed a second opportunity to elect transfer.

(2) The continuous service date to be established for such Employee in the new unit.

(3) The date on which the second opportunity must be exercised following start-up of the new facility, but not more than 3 years thereafter. (In determining such date, the parties shall give due consideration to possible Management abandonment of the old facility or an extended period of its nonuse).

In lieu of or in addition to the foregoing, the local parties may develop a method for filling permanent vacancies in the new facility between the time of initial manning and the final election to transfer.

F. Should Management deem it necessary to assign an Employee to his regular job on the old facility in order to continue its efficient operation, it may do so on the basis of establishing such Employee on the new job and temporarily assigning him to his former job until a suitable replacement can be trained for the job or its performance is no longer required. In such event, such Employee shall be entitled to earnings not less than what he would have

made had he been working on the job on which he has been established.

G. Where new facilities replace facilities of more than one plant in the same general locality, appropriate representatives of the Company and the International Union shall meet in conjunction with the local parties for the purpose of seeking an agreement on manning consistent with the parties' mutual intent to facilitate efficient manning and preserve job security for longer-service Employees. In such situations, Company service may be considered in addition to plant service, department service, unit service, or job service.

SECTION 15—INTRAPLANT JOB OPPORTUNITIES

In order to increase intraplant job opportunities for longer-service Employees, all local seniority agreement provisions or rules relating to intraplant transfers not providing greater intraplant job opportunities are hereby modified as set forth below. It is recognized, however, that this Section 15 shall not be construed as a limitation on the right of the local parties to negotiate local agreements providing greater intraplant job opportunities at any time during the life of this Agreement.

(a) Any vacancy (other than a temporary vacancy) that is not filled in accordance with any other provision of this Agreement (except Section 13 of this Article Ten), including local seniority agreements, shall be made available to a qualified Employee, who has at least 6 months of plant continuous service, in any other seniority unit in the agreed upon area as established pursuant to Subsection B of Section 12 of this Article Ten, or in the plant in those cases where no agreed upon areas have been established. Vacancies shall be made available to such Employees in accordance with the seniority factors set forth in Section 1 of this Article Ten using plant continuous service.

(b) In a plant where there is more than one agreed upon area as established pursuant to Subsection B of Section 12 of this Article Ten, the following shall apply:

Any vacancy (other than a temporary vacancy) that is not filled in accordance with Subparagraph (a) above shall be made available to a qualified Employee in any other agreed upon area in the plant who has at least 1

year of plant continuous service. Vacancies shall be made available to such Employees in accordance with the seniority factors set forth in Section 1 of this Article Ten, using plant continuous service and subject to the following:

(1) An Employee must be qualified to perform the job.

(2) Management may require an Employee to have the necessary qualifications to progress in the promotional sequence involved to the next higher job to the extent that Management needs Employees for such progression. In determining the necessary qualifications to advance in the promotional sequence involved, the normal experience acquired by Employees in such sequence

Supreme Court of the United States

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORP.

ORDER ALLOWING CERTIORARI. Filed October 29, 1979.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

Supreme Court, U. S.
FILED
SEP 27 1979
MICHAEL RODAK, JR., CLERK

No. 79-81

In The
Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

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Counsel for respondent has previously indicated by letter that respondent does not oppose the petition for a writ in this case. Respondent submits that the courts below correctly applied the law to the facts. However, respondent acknowledges that the Court of Appeals for the Third Circuit reached a contrary result. Respondent would welcome the granting of the writ so that this conflict might be resolved. Respondent believes that an examination of the facts and application of the law will result in an affirmance of the result reached by both lower courts in the instant case.

RESPONSE TO PETITIONER'S DISCUSSION OF REASONS FOR GRANTING THE PETITION

In seeking the granting of the writ in this case, petitioner has argued two points. Petitioner has noted the existing conflict in the decisions of the Sixth and the Third Circuits. As indicated above, respondent acknowledges that conflict.*

The second argument advanced by petitioner is that it is the instant case which has been wrongly decided. Respondent submits that the lower courts in the instant case have reached the correct decision.

The issue in this case is whether a returning veteran must be given supplemental unemployment benefit (SUB) credits for the entire time during which he was absent from private employment, even though such units are earned only through work. The collective bargaining agreement in effect in the steel industry clearly provides that the returning veteran does not receive such SUB credit units. Rather he is treated exactly as any other employee on leave of absence as required by law.

This Court has of course previously articulated the general principles of law in this area. In *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), it was resolved that vacation benefits earned through a bona fide work requirement need not be provided to a returning veteran who had not met the work requirement. In *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), it was resolved that time in the military must be credited as service time for purposes of computing pension entitlement. This Court has not previously addressed the SUB credit issue.

As can be seen by reviewing the two detailed opinions by the District Court in the instant case, the trial judge clearly understood the principles articulated in both the

*Petitioner also alleges a conflict with the Seventh Circuit decision in *Akers v. General Motors Corp.*, 501 F.2d 1042 (1974). There is no real conflict. There the court found no bona fide work requirement.

Foster and the *Alabama Power* decisions. The trial judge discussed both decisions at length. He then properly applied those principles to the evidence adduced in the case. Such evidence clearly demonstrated the bona fide nature of the work requirement. Indeed, the evidence on that issue was undisputed.

The entire argument of the petitioner is based on an assertion that the "real nature" of the SUB credit is tied to seniority. But that is not the case. Petitioner tries to analogize SUB credits to pension benefits. But the analogy is faulty. Certainly pension entitlement is keyed to seniority. Basic eligibility is dependent upon time in service. The amount of the pension payment is tied to time in service.

That is not the case with SUB credits. As is shown in the record below, no employee may accumulate more than 52 credit units. Credit units are generally earned only by work. The amount of the benefit is not tied to seniority. Thus a 20-year employee may well receive exactly the same benefit as a 3-year employee. SUB credits are short-term benefits, earned through work. They are a classic wage substitute which is earned in the short term and exhausted in the short term.

The opinions of the District Court in the instant case demonstrate that the trial judge thoroughly analyzed these issues. He correctly found that the collective bargaining agreement should be applied precisely as it was written. Petitioner is incorrect when he asserts that the instant case was wrongly decided.

Indeed, it is ironic that the principal relationship between SUB credits and seniority is a negative one. SUB credits are exhausted during times of lay-off. Generally, lay-off priority is determined by seniority. Thus the more seniority an employee has, the less likely he is ever to need his SUB credits.

The steel industry has long perceived the distinction between pension benefits and SUB credits. As the record below demonstrates, the collective bargaining

agreement for the industry provides that the returning veteran is given seniority credit for his time in the military. Thus, long before the *Alabama Power* decision, the steel industry credited military service time for pension purposes. No such credit is given for SUB credits, however, because the benefits are entirely different.*

Respondent will not belabor the point in this brief. Respondent acknowledges the conflict between the decisions reached in the instant case and the decision reached by the Third Circuit in *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (1973). Respondent believes that the lower courts in the instant case are correct and would welcome the opportunity to have this Court resolve the conflict by hearing this case.

CONCLUSION

Respondent does not oppose the petition for a writ of certiorari, but does submit that the courts in the instant case have correctly ruled.

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*The benefits are different from the standpoint of the veteran as well. In a two or three year stint in the military, the veteran gains no pension benefit. Thus, if he loses pension time from his civilian employment, he never regains it. SUB credits, however, protect against lay-off. Since the veteran has been under no threat of lay-off during his stint in the military, he has lost nothing. Indeed he has gained in that sense.

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BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unofficially reported at 85 Lab. Cas. (CCH) ¶ 11,012. The court's order is noted in a table at 590 F.2d 334. The opinion of the district court following remand (Pet. App. 3a-11a) is reported at 461 F. Supp. 344. The first opinion of the court of appeals (Pet. App. 12a) is unofficially reported at 82 Lab. Cas. ¶ 10,071. The first opinion of the district court (Pet. App. 13a-30a) is unofficially reported at 77 Lab. Cas. ¶ 11,158.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1978, and a petition for rehearing was denied on February 16, 1979 (Pet. App. 31a). On May 8, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 15, 1979, and on June 6, 1979, Mr. Justice Stewart further extended the time to and including July 16, 1979. The petition for a writ of certiorari was filed on that date and was granted on October 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether supplemental unemployment benefits provided pursuant to the steel industry collective bargaining agreement are a perquisite of seniority to which a returning veteran is entitled under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*[1]

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[1] The complaint in this case alleged a violation of Section 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. 459 (see A. 4-5). The provisions of that statute relating to veterans' reemployment rights were recodified without substantive change by Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.* See *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 582 n.2 (1977). References in this brief will be to the recodified provisions, commonly referred to as the Veterans' Reemployment Rights Act.

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 2021 provides in pertinent part:

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * * *
>
> (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> > (i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay * * *.
>
> * * * * *
>
> (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such

person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

STATEMENT

1. Petitioner was employed by respondent as a crane operator from April 30, 1968, until September 17, 1968, and then again from January 24, 1969, until he left to enter military service on September 9, 1969 (A. 8; Pet. App. 19a).[2] He served in the military until August 16, 1971, when he was honorably discharged (A. 8).

[2] Although a short trial was held in this case on July 31, 1975, the basic facts are not in dispute and were the subject of a stipulation entered into by the parties (A. 8-11).

Petitioner timely applied for reinstatement to his previous position on September 14, 1971, and was reinstated. Because petitioner would have been laid off by that date had he remained continuously employed with respondent, however, he was immediately placed in layoff status. Petitioner was subsequently recalled to work on July 1, 1972. During the period of layoff, petitioner received supplemental unemployment benefits (SUB) from respondent for approximately six months (approximately 25 credits) (A. 8).[3]

The supplemental unemployment benefit plan (A. 12-33) created by the collective bargaining agreement between the major steel companies (including respondent) and the United Steelworkers of America provides weekly payments to employees laid off from work. The benefits supplement unemployment compensation to which the employee is entitled under state law. The length of time during which an employee receives SUB payments while on layoff is determined by the number of credit units he has accumulated prior to layoff. Section 2.0 of the plan provides that an employee accrues one half credit for each week in which he has any of the following hours:

a. Hours worked for the Company,

[3] Because respondent erroneously credited petitioner with SUB credits for his 1968 employment, approximately $322 of benefits (approximately 9 credits) was overpaid and was recovered by respondent through deductions from petitioner's paycheck after he returned to work (A. 8).

b. Hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance,

c. Hours not worked and not paid for but which were lost because:

(1) He was performing his duties as [a local union officer], or

(2) He was absent because of disability for which benefits are payable under a Workmen's Compensation or Occupational Disease law or the Company Program of Insurance Benefits.

(A. 19). A maximum of 52 credit units may be accrued by an employee at any one time (A. 20). He normally uses one credit unit for each week that he is paid supplemental unemployment benefits (Section 2.3, A. 20). However, the employee does not receive any SUB payments unless he has completed two years of continuous service prior to his layoff (Section 3.0, A. 20).

The SUB plan also provides (Section 7.2, A. 29):

> If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law.

Thus, under the plan, upon his reemployment after military service, petitioner was credited with the credit units he had accumulated prior to his entering military service (approximately 16), but he was not accorded any additional credit units for the period he spent in military service. The parties have agreed that if petitioner had not entered military service, he would have accumulated the maximum of 52 credit units and thus would have received SUB payments for the entire nine and a half months he was on layoff status (A. 11).

2. Petitioner filed suit in the United States District Court for the Northern District of Ohio on March 13, 1974, alleging that respondent had violated his statutory veterans' reemployment rights under the Military Selective Service Act of 1967[4] by refusing to consider his military service time in computing the amount of SUB credit units he had accumulated at the time he was reinstated after his military service (A. 4).[5] Petitioner alleged that supplemental unemployment benefits are a "perquisite of seniority" (*Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 230 (1966)) under the statute because they represent protection against economic loss in much the same way as seniority. Thus, he claimed that upon his return to his civilian employment, his amount of SUB credit units should have been com-

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[4] See note 1, *supra*.

[5] The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

puted "as * * * if [he] had continued in such employment continuously from the time of [his] entering the Armed Forces until the time of [his] restoration to such employment" (38 U.S.C. 2021(b)(2)).

The district court, relying on *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), entered judgment for respondent, holding that SUB credits are accumulated based on a " 'work requirement [that] constitutes a bona fide effort to compensate for work actually performed' " (Pet. App. 23a). While the case was pending on petitioner's appeal to the Sixth Circuit, this Court decided *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), holding that pension benefits are a perquisite of seniority under the statute and thus that the time spent in military service must be credited toward an employee's pension benefits. The court of appeals sua sponte vacated the district court's judgment and remanded the case for reconsideration in light of *Alabama Power* (Pet. App. 12a).

On remand, the district court adhered to its original decision that SUB credits are not seniority rights entitled to statutory protection. It reiterated that "SUB benefits are 'in the nature of short term compensation for services rendered' and 'not an aspect of seniority within the coverage of' " the statute and that "entitlement to SUB benefits 'require[s] more than continued status, such as a work requirement demanding actual performance on the job' " (Pet. App. 7a-8a).

The court of appeals affirmed "for the reasons set forth in [the] second opinion for the district court" (Pet. App. 2a).

SUMMARY OF ARGUMENT

38 U.S.C. 2021 requires that a returning veteran be reinstated "without loss of seniority" to the job he held when he left for military service. The veteran must receive seniority credit for his time spent in the service so that he stands in the same place on the seniority escalator as he would if he had remained on the job. The Court has construed this statute liberally for the benefit of the returning veteran. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

In *Alabama Power Co.* v. *Davis*, 431 U.S. 589 (1977), the Court held that a benefit is considered a "perquisite of seniority," subject to statutory protection, if it is in the nature of a reward for length of service, rather than in the nature of short-term compensation for work performed. This determination can be made only by examining the "true nature" of the benefit and its "function * * * in the employment system" (*id.* at 594), not simply by considering how the benefit is calculated under the collective bargaining agreement. Applying these principles, the Court has determined that layoff protection, severance payments and pension benefits are perquisites of seniority, while vacation pay is not.

The supplemental unemployment benefits (SUB) at issue in this case are payments by the company that supplement state unemployment benefits. Their purpose is to provide employees with security that they will continue to receive income during layoff periods.

Thus, SUB operates as a second stage of the layoff protection seniority system; during layoff periods, more senior employees retain their jobs while less senior employees who have achieved a minimum level of seniority receive SUB payments. These payments are similar to pension payments in that they help the employer to preserve a stable work force, but they are most closely analogous to severance payments. Both are contingent payments that occur only when a layoff occurs, and they serve as a substitute for the income that an employee has come to rely upon during his tenure on the job. Thus, SUB payments provide security for the future based upon past service, as do most seniority benefits, rather than compensation for work already performed. Accordingly, every court that has considered the question, other than the lower courts in this case, has found SUB payments to be a perquisite of seniority.

The specifics of respondent's SUB plan demonstrate that SUB payments are not compensation for work performed. Employees who have not completed two years of continuous service do not receive any SUB payments. This two-year eligibility threshold is a common feature of other provisions of the "Seniority" Article of the collective bargaining agreement. SUB credits that have been accumulated are subject to forfeiture if the employee quits or incurs a break in service. Moreover, the amount of the weekly payment is not correlated with the work performed by an employee in earning the credits; it is based upon his salary level at time of layoff, the number

of his dependents and the financial status of the SUB fund. Unlike the vacation pay considered by the Court in *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), SUB payments are not made on a pro rata basis to employees who do not meet the two-year vesting requirement, and no additional SUB credits are provided for overtime work.

These aspects of the plan demonstrate that SUB payments are not a form of short-term compensation for work performed, but are a form of security granted in reward for length of service. Accordingly, Congress has provided that the time petitioner spent in military service must be counted toward his total of SUB credits.

ARGUMENT

SUPPLEMENTAL UNEMPLOYMENT BENEFITS ARE A PERQUISITE OF SENIORITY UNDER 38 U.S.C. 2021

A. An Employee Benefit Is A Perquisite Of Seniority If By Its "Real Nature" It Is A Reward For Length Of Service Rather Than Short-Term Compensation For Work Performed

In passing the nation's first peacetime draft law in 1940 (54 Stat. 885), Congress provided that veterans would not be prejudiced upon their return to civilian employment because of their military service. The protections enacted at that time have continued in effect until the present day. Specifically, Congress provided, in what is now codified as 38 U.S.C. 2021, that a veteran who left a position of employment as a civilian must, upon his return, "be restored [by his employer] * * * to such position or to a position

of like seniority, status, and pay." 38 U.S.C. 2021(a)(2)(B)(i). This reemployment must be "without loss of seniority." 38 U.S.C. 2021(b)(1). The statute, however, contained no definition of "seniority," and the legislative history offered no guidance as to the scope of that term. See *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 585 (1977).[6]

These reemployment provisions were first construed by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), where the Court held that the statute did not grant a returning veteran an increase in seniority above what he would have accumulated if he had never entered the service. In analyzing the statute, the Court announced "two principles that have governed all subsequent interpretations of the reemployment rights of veterans" (*Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 584). First, the Court established the "escalator principle," stating (328 U.S. at 284-285):

> [The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * *
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> * * * * *
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> He acquires not only the same seniority he had; his service in the armed services is counted as

[6] Congress' primary purpose in passing the statute was to draft men for military service. Possible problems under the reemployment provisions received little consideration. See Note, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 123, 148 (1966).

> service in the plant so that he does not lose ground by reason of his absence.

The second principle was that "[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." 328 U.S. at 285.

In its reenactment of the statute in 1948 (62 Stat. 614), Congress explicitly incorporated the "escalator principle" into what is now 38 U.S.C. 2021(b)(2). That section provides that a returning veteran should be restored to his employment:

> in such manner as to give [him] such status in [his] employment as [he] would have enjoyed if [he] had continued in such employment continuously from the time of [his] entering the Armed Forces until the time of [his] restoration to such employment.

See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 584.

Protection against layoff, with respect to which the Court first announced the "escalator principle" in *Fishgold*, is a right or benefit that has traditionally been regarded as an attribute of seniority. In the years following the *Fishgold* decision, the Court continued to deal with the application of the "escalator principle" to traditional perquisites of seniority, such as order of promotion and priority with respect to job assignments. See, *e.g.*, *Tilton* v. *Missouri Pacific*

R.R., 376 U.S. 169 (1964); *Oakley* v. *Louisville & Nashville R.R.*, 338 U.S. 278 (1949).

The question of whether a particular benefit should be considered a "seniority" benefit for the purposes of the statute first arose in *Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225 (1966). There, the Court applied the "escalator principle" to severance pay, a benefit that is "not traditionally considered a seniority right." *Foster* v. *Dravo Corp.*, 420 U.S. 92, 97 (1975). Under the collective bargaining agreement involved in *Accardi*, each discharged employee was paid a separation allowance according to a formula based upon the length of his "compensated service" with the railroad. The railroad argued that time spent in military service need not be included as "compensated service" because severance pay was not based on seniority—as indeed under the terms of the agreement it was not. But the Court concluded that the "real nature" (383 U.S. at 230) of severance payments was as compensation for the loss of rights and expectations that accrued during an employee's length of service with the company. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 588. The statute thus required that time spent in military service be included in calculating the severance pay allowances, because the amount of those allowances was "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." 383 U.S. at 230.[7]

[7] The Court also drew support for its conclusion that the severance pay was primarily based on length of service from the "bizarre results" that the formula in the agreement could produce—theoretically, an employee could earn a year of "compensated service" by working only one day per month for seven months. *Accardi* v. *Pennsylvania R.R.*, *supra*, 383 U.S. at 230. The Court did not suggest, however, that the applicability of the statute to a particular benefit would depend upon whether such a bizarre result could be demonstrated. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 588 & n.9.

The Court in *Accardi* also explained the relationship between the statutory guarantee against loss of seniority and the provision granting "insurance or other benefits" to returning veterans as if they had taken a leave of absence under the employer's rules. See 38 U.S.C. 2021(b)(1). The Court found that the latter provision "was intended to add certain protections to the veteran and not to take away those which are granted him by [the seniority protection provision]." 383 U.S. at 232. Accordingly, whether a benefit can be categorized as "insurance or other benefits" is irrelevant to determining the scope of the seniority protection; the inquiry must focus on whether the benefit in question is a perquisite of seniority. See *Alabama Power Co. v. Davis*, *supra*, 431 U.S. at 588 n.10.

The Court considered a very different type of benefit in *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), rejecting the claim that a returning veteran was entitled to vacation pay for the time spent in military service. The Court found that vacation benefits, which are commonly conceived of "as a reward for and respite from a lengthy period of labor" (420

U.S. at 101), are "intended as a form of deferred compensation" or "short-term compensation for work performed" and should not be treated as a perquisite of seniority under the statute. 420 U.S. at 100.

Most recently, in *Alabama Power* v. *Davis, supra*, the Court held that pension benefits are a perquisite of seniority with respect to which veterans are entitled to credit for time spent in the service. The Court summarized the principles that had been announced in the cases from *Fishgold* through *Foster* as establishing a two-pronged test for determining whether a benefit is a right of seniority protected by the statute (431 U.S. at 589):

> If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of [the statute].

Applying these principles, the Court held that, even though "pension payments have some resemblance to compensation for work performed" (431 U.S. at 592), they "are predominantly rewards for continuous employment with the same employer." 431 U.S. at 594.

The Court in *Alabama Power* also specifically addressed the misconception that had arisen after *Accardi* that a benefit could not be a perquisite of seniority under the statute if eligibility for the benefit was based upon a bona fide work requirement.[8] This misconception had been reinforced to some extent by the Court's statement in *Foster* that "the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation." 420 U.S. at 99. The Court had found support for the existence of a bona fide work requirement in *Foster* in the provisions of the contract that provided (1) additional vacation benefits for overtime work and (2) pro rata vacation benefits for employees who, because of layoffs, were unable to work the 25 weeks in a year ordinarily required. 420 U.S. at 100. First, the Court in *Alabama Power* explained that the work requirement in *Foster* was simply one fact that lent support to the argument that the vacation benefits were a form of compensation, but it was the nature of those benefits as "'a reward for and respite from a lengthy period of labor'" that was "decisive." 431 U.S. at 589. The Court went on to state that the particular formula by which a benefit is calculated cannot determine whether it is a perquisite of seniority because "[e]ven

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[8] See, *e.g.*, Comment, *Veterans' Reemployment Rights: Severance Pay*, 1974 Wash. U.L.Q. 296, 303; *Adams* v. *General Motors Corp.*, 525 F.2d 161, 165-166 (6th Cir. 1975). The district court relied almost exclusively on this theory in its first decision in this case (Pet. App. 23a-25a).

the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee." *Id.* at 592. See also *Palmarozzo* v. *Coca-Cola Bottling Co.*, 490 F.2d 586, 592 (2d Cir. 1973). The Court emphasized, as it had in *Accardi* (383 U.S. at 230), that the inquiry must focus on the "true nature" of the benefit. 431 U.S. at 592-593.

B. The "Real Nature" Of Supplemental Unemployment Benefits Is As Income Security Based On Length Of Service Rather Than As Short-Term Compensation

It is undisputed that the SUB payments at issue in this case satisfy the first prong of the *Alabama Power* inquiry—the reasonable certainty that the benefits would have accrued if petitioner had not gone into military service.[9] The parties have stipulated that petitioner would have been entitled to 52 credit units at the time of his layoff except for his military service (A. 8). The question presented here thus concerns the second prong of the analysis—whether the "real nature" of SUB is as a reward for length of service or, rather, as short-term compensation for work performed.

1. *The Nature and Purpose of SUB is as Income Security for Established Employees in Times of Unemployment*

The concept of supplemental unemployment benefits was first introduced in American industry in

[9] For an example of a benefit that did not meet the "reasonable certainty" standard, see, *e.g.*, *McKinney* v. *Missouri-K.-T. R.R.*, 357 U.S. 265 (1958).

1955 in the collective bargaining agreement negotiated between the United Auto Workers and the Ford Motor Company. SUB payments were incorporated shortly thereafter into labor agreements in the steel and can industries. See S. Slichter, J. Healy and E. Livernash, *The Impact of Collective Bargaining on Management* 453 (1960) [hereinafter cited as Slichter]. The introduction of SUB was the result of a vigorous drive by organized labor in the 1950's for a guaranteed annual wage. Where employment security could not be guaranteed, labor unions sought income security.[10]

The SUB plan negotiated with Ford did not completely meet labor's goal of a guaranteed annual wage because SUB payments did not amount to 100% of take-home pay, but it did serve as a method of guar-

[10] In April 1954, the UAW announced six basic principles to govern its proposal to the auto companies. The substance of the income guarantee was included in the second and third principles:

> 2. Guaranteed Annual Wage payments should be made to workers for whom management fails to provide work, in amounts sufficient to insure take-home pay adequate to maintain the living standards which the worker and his family enjoyed while fully employed.
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> 3. All workers should be guaranteed employment or guarantee payments from the time they acquire seniority. The guarantee should assure protection against a full year of layoff for all workers and for shorter periods on a graduated basis for those who have not worked the minimum qualifying period.

See J. Becker, *Guaranteed Income for the Unemployed—The Story of SUB* 14-15 (1968).

anteeing significant income for eligible employees during layoff periods. See generally J. Becker, *Guaranteed Income for the Unemployed—The Story of SUB* 9-20 (1968). Thus, SUB has never been intended as compensation for work performed, but rather was viewed from the outset as a form of security for regular employees in times of unemployment. In addition, from its inception,[11] SUB has not been intended to be available to all employees, but only to those who have achieved a certain level of seniority. The original Ford plan was restricted to employees with one year of seniority.

The SUB provisions of the collective bargaining agreement that provide income security complement the more traditional seniority benefit of employment security. Prior to the introduction of SUB, when an employer faced a layoff situation, employees were laid off in order according to their seniority, with the more senior employees retaining their jobs while the less senior employees were left with nothing, other than the unemployment compensation provided by the state. With the advent of SUB, this situation is altered. The seniority accrued by employees with insufficient seniority to avoid being laid off no longer goes to waste; it is credited towards SUB payments. SUB thus establishes a two-tier system of layoff pro-

[11] In 1952, a union staff committee concluded that a new plan was needed to present to the industry concerning guaranteed income. That plan would have to "(a) provide employers with a strong incentive to stabilize employment; and (b) provide all seniority employees with guaranteed income." J. Becker, *supra*, at 13-14.

tection that permits the benefits of seniority to filter down to lower levels of the seniority ladder than in the past; when a layoff period ensues, the most senior employees retain their jobs, less senior employees receive SUB payments while they are laid off, and employees who have not achieved a level of seniority that makes them eligible for SUB payments receive no layoff protection.[12]

The Third Circuit focused on this relationship between SUB and traditional seniority layoff protection in contrasting vacation benefits with SUB payments for the purposes of returning veterans' seniority rights. In *Foster* v. *Dravo Corp.*, 490 F.2d 55, 59 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975), the court, distinguishing the SUB payments that it had held

[12] The collective bargaining agreement at issue in this case does not provide any greater SUB rights to employees near the top of the seniority ladder than to those near the bottom. The maximum of 52 credits can be earned in two years of service. This facet of the plan was reasonable because employees near the top of the seniority ladder could be expected to retain their jobs during layoffs; thus, when the agreement was negotiated, the extent of their SUB payments was not an important concern of senior employees. This situation has changed somewhat in recent years because of the increased incidence of plant closings, which put even the most senior employees out of work. Accordingly, the SUB plan in the steel industry was amended in 1977 to provide an additional 52 weeks of SUB payments to employees with 20 or more years of seniority if they are not offered appropriate work at their home plant or suitable long term employment at another location in case of plant shutdown. See A. Freedman, "Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work," *The Conference Board* 33 (1978).

to be perquisites of seniority in *Hoffman* v. *Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973), stated:

> Unlike vacation benefits, the protection which the SUB plan furnishes is part of an employee's job security interest. The SUB plan is designed to and in fact does give the employee assurance that throughout his employment he not only earns his take home pay, but also accumulates assurance that, if exigencies of business require that he be laid off, he will have income for some period of time. The plan is a way of conferring, in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment. The SUB plan thus has as its purpose and effect the extension of a seniority-type protection to employees who, due to their relatively short length of service with the company, would formerly have been unprotected. Therefore, [38 U.S.C. 2021], interpreted in the light of its overall purpose and applied to give effect to evolving practice in labor relations, can fairly be said to require that the returning veteran be accorded this seniority-type advantage.

See also *Akers* v. *General Motors Corp.*, 501 F.2d 1042, 1045 n.11 (7th Cir. 1974).

Although SUB payments differ somewhat from the employment benefits this Court has previously analyzed, a number of significant similarities do exist. SUB payments play a role much like pension benefits in maintaining a stable work force for the employer during layoff periods. As the Court noted in *Alabama*

Power, "a [pension] plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force." 431 U.S. at 594. Employees who might otherwise take other jobs remain because of their vested interest in the pension plan. Similarly, "[t]he SUB payment itself is an inducement for the employee to weather the layoff period and return to work when [the company] needs the employee's services." *Thornhill* v. *Ormet Corp.*, 84 Lab. Cas. (CCH) ¶ 10,786 at 19,020 (S.D. Ohio 1978).[13]

SUB payments are most closely analogous, however, to severance payments, which are also fundamentally "income security" benefits. See generally Slichter, *supra*, at 447-489. As one commentator has noted, "[b]oth severance pay and supplemental unemployment benefits (SUB) are designed to provide some income during unemployment, and to mitigate the income loss. Usually, such income security plans are found together with unemployment-allocating measures such as seniority provisions." A. Freedman, "Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work," *The Conference Board* 2 (1978).

In addition to mitigating income loss, both SUB payments and severance payments are contingent

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[13] See also J. Becker, *supra*, at 248: "In short-term layoffs, SUB helps to maintain the employer's labor force intact until he is ready to resume operations. The longer the training process involved, the more an employer is likely to value the help of SUB in maintaining his labor force. Thus, this effect would have somewhat greater significance in steel, for example, than in the can industry." See also *id.* at 57.

payments.[14] An employee can have no specific expectation of receiving either type of payment, because they are made only in the event of a layoff, either temporary or permanent, that may never occur. Thus, the payments are not in the nature of compensation for work performed. Rather, as the Court said in *Accardi*, they are "compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past —no matter how calculated—but by the rights and benefits he forfeits by giving up his job." 383 U.S. at 230.[15]

Three cases, other than the case at bar, have dealt with the proper characterization of SUB payments under 38 U.S.C. 2021. In *Hoffman* v. *Bethlehem Steel Corp.*, *supra*, the Third Circuit held that bene-

[14] See *Thornhill* v. *Ormet Corp.*, *supra*, 84 Lab. Cas. ¶ 10,786 at 19,020.

[15] Both severance pay and SUB payments also give the employer added flexibility in decision making, such as implementing technological advances, because they cushion the impact of management decisions upon employees. One commentator has noted that "[a]fter SUB plans were established in the steel industry in 1956, two companies closed some plants that had become obsolete. The union is convinced, though positive proof is lacking, that the companies acted more swiftly and more drastically than they otherwise would have because the SUB fund was available to cushion the shock of the closings." Becker, *supra*, at 56. Severance pay also eases the way for technological change. For example, the severance payments at issue in *Accardi* were the result of the conversion of tugboats from coal to diesel fuel and the elimination of the position of fireman on all diesel tugs. 383 U.S. at 227.

fits under the identical steel industry SUB plan at issue in this case are a perquisite of seniority. In *Akers* v. *General Motors Corp.*, *supra*, the Seventh Circuit held that SUB payments under the auto industry plan are a perquisite of seniority, finding that such payments are "analogous" to the severance payments in *Accardi* (501 F.2d at 1045) and that the "obvious purpose and 'real nature' of SUB is to confer one of the chief advantages of seniority—protection against economic loss in a period of diminishing employment" (*id.* at 1045 n.11). Accord, *Parrish* v. *General Motors Corp.*, 75 Lab. Cas. ¶ 10,373 (S.D. Ind. 1974). And in *Thornhill* v. *Ormet Corp.*, *supra*, involving a SUB plan in the aluminum industry "indistinguishable" from that existing in the steel industry (84 Lab. Cas. ¶ 10,786 at 19,021), the court declined to follow the decision of the district court in this case, finding that SUB payments are "essentially perquisites of seniority which accrue by virtue of the length of an employee's service and have the same purpose and effect as other seniority benefits." *Ibid.*[16] Thus, every other court that has considered the question has concluded that SUB payments are a perquisite of seniority with respect to which a returning veteran is entitled to credit for his military service.[17]

[16] The court in *Thornhill* expressly rejected the suggestion of the district court in this case (Pet. App. 23a) that the existence of a work requirement removes SUB payments from the coverage of the statute's seniority protections. 84 Lab. Cas. ¶ 10,786 at 19,021.

[17] See also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 782 n. 1 (Powell, J., concurring in part and dissenting

2. *The Specific Provisions of the SUB Plan in This Case Demonstrate That SUB Payments are not Short-Term Compensation but Rather are a Reward for Length of Service*

The provisions of respondent's SUB plan clearly negate the suggestion that SUB payments are intended as a form of deferred compensation for work performed. Employees do not become eligible for SUB payments at all until they have completed two years of "continuous service" (Section 3.0, A. 20). Accordingly, an employee who is laid off after working for 23 months is not eligible for any SUB payments, while an employee who is laid off after working for 24 months is eligible for SUB payments and would receive those payments for 52 weeks.[18] This remarkable disparity in the SUB treatment of two employees who have performed virtually the same amount of work is completely inconsistent with the characterization of SUB payments as compensation for work performed.

The requirement of a vesting period before receiving SUB benefits is a common feature of other benefits that are covered by the statutory seniority protection. Pension plans, for example, almost invariably require a vesting period of service before an

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in part) ("benefit"-type seniority ordinarily includes unemployment insurance payments).

[18] An employee earns one-half SUB credit for each week worked (Section 2.0, A. 19), so after two years an employee will have earned 52 credits.

employee becomes eligible for benefits.[19] In fact, Article 10 of the collective bargaining agreement between respondent and the United Steelworkers, entitled "Seniority" (A. 34-55), makes clear that two years of continuous service is a critical period for the receipt of traditional seniority benefits. Section 12 of Article 10 has the purpose of increasing intraplant job security for "longer-service [e]mployees" (A. 41). Under this section, seniority pools are established for job security purposes, and employees who have two years of plant continuous service are eligible for layoff protection in those pools (A. 41-43). Section 13—Interplant Job Opportunities and Section 14—Manning of New Facilities are also keyed to employees who have two years of plant or company continuous service (A. 44, 48, 52). Thus, the district court's conclusion (Pet. App. 8a) that the two-year service requirement for SUB eligibility does not relate the benefits to length of service is mis-

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[19] To be sure, the vesting period of two years involved in this case is far shorter than the 15-year vesting requirement of the pension plan involved in *Alabama Power*. However, the Court there noted that the shorter vesting periods established under Section 202 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1053 do not alter the nature of pension plans for the purposes of veterans' reemployment rights. 431 U.S. at 590 n.13. Moreover, the two-year vesting period here is on the same scale as the benefit payout period, which is limited to one year. Pension payments generally continue for the lifetime of an employee, often with a right of survivorship in a spouse. See D. McGill, *Fundamentals of Private Pensions* 118-119, 140 (3d ed. 1975). Thus, a longer vesting period for them is appropriate.

taken. On the contrary, the two-year requirement is the standard in the collective bargaining agreement for determining "longer-service employees" who are eligible for traditional seniority benefits.[20]

Other features of the SUB plan also are inconsistent with the characterization of SUB payments as compensation for work actually performed. SUB credits that have been accumulated are lost when an employee incurs a breach in continuous service (Section 2.5, A. 20). An employee is disqualified from receiving SUB benefits if he quits or is on layoff due to a strike (Section 3.5, A. 23).[21] Hence, an employee does not have a vested right to SUB benefits, as he would to compensation for his work; his right to the benefits is subject to conditions that relate to his continued service with the company.

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[20] Respondent recognized that petitioner's military service should be included in his "continuous service" total, which is also used as the measure of service for pension purposes (A. 15). Accordingly, it found that petitioner had satisfied the two-year vesting requirement and declared him eligible for SUB benefits, although he had worked for the company for only seven and one-half continuous months prior to his layoff in September 1971. Respondent, however, did not count the time petiitoner spent in military service in calculating his SUB credits. This anomalous treatment—crediting military service as company service for one SUB purpose but not for another—enabled petitioner to receive some SUB payments, but considerably less than he would have received had he not entered the service.

[21] An employee is also not entitled to receive SUB payments if he is entitled to receive a similar benefit under an arrangement provided by another employer with whom the employee has "more service" (Section 7.3, A. 29-30).

Moreover, the amount of the weekly SUB payment received is not correlated to the earning of the credits, as true compensation would be. The payment is based upon the employee's wage at the time of layoff, rather than when the SUB credits are earned. Compare *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 594. This base is then adjusted according to the number of an employee's dependents (Section 1.0, A. 17). Clearly, this adjustment has nothing to do with compensation. Rather, as the court stated in *Thornhill* v. *Ormet Corp.*, *supra*, "a larger benefit is paid an employee with more dependents because a greater inducement is necessary to assure his continued employment." 84 Lab. Cas. ¶ 10,786 at 19,020 n.9. Finally, an employee's SUB payments are always subject to reduction, without any action on his part, in order to safeguard against excessive depletion of the SUB fund (Section 1.5, A. 18-19).

These provisions contrast sharply with the vacation benefits in *Foster* v. *Dravo Corp.*, *supra*, which the Court found to be intended as short-term compensation for work performed. The Court stressed two features of the benefits in *Foster*, neither of which is present in the SUB plan. First, vacation benefits were awarded on a pro rata basis to employees who did not work the minimum 25-week period due to layoffs (420 U.S. at 100); here, SUB payments are not made on a pro rata basis to employees who have not satisfied the two-year vesting requirement. Second, the agreement in *Foster* provided additional vacation benefits to employees who had worked sub-

stantial overtime (*ibid.*); no additional SUB credits are provided for overtime work. Thus, while (with limited exceptions) SUB credits are granted only to employees who are working,[22] there is no correlation between the amount of work performed and the amount of benefits credited.

In sum, the district court erred in finding that "SUB benefits are 'in the nature of short term compensation for services rendered'" (Pet. App. 7a-8a). The court incorrectly focused its attention on whether the SUB plan "constitutes a bona fide effort to relate qualification for weekly benefits under the SUB plan to work actually performed" (Pet. App. 24a; see also *id.* at 7a). In *Alabama Power*, this Court explained that there is no such "*Foster* test of a 'work requirement'" (Pet. App. 7a); *Foster* turned on the "real nature" of vacation benefits. 431 U.S. at 589, 592. The Court noted that any seniority benefit could easily be tied to a work requirement. *Id.* at 592. Thus, conditioning the treatment of a benefit upon the existence of a work requirement would leave the

[22] SUB credits are accumulated by employees while they are on paid vacation or jury duty, while serving as a local union officer, or while absent because of disability (Section 2.0, A. 19).

Moreover, the SUB plan does not contain a minimum hours requirement for those employees who earn credits while working. The district court found that it is "very unusual" for an employee in the steel industry to work less than 32 hours in any week (Pet. App. 24a). In those unusual cases, however, an employee working less than 32 hours would receive the same amount of SUB credits, under the terms of the plan, as an employee working 32 or more hours.

characterization of a benefit up to the employer. However, "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285. See also *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 592.[23] The test is the "real nature" of the benefit and its "function * * * in the employment system" (*id.* at 594). The true nature and function of SUB payments is as a reward for length of service, not as compensation for work performed.

The effect of respondent's SUB policy is simple; a fellow employee who both began work and was laid off on the same date as petitioner would have continued to receive SUB payments for several months after SUB payments to petitioner were discontinued. This disparity in treatment results solely from the fact that petitioner took time off from his job to serve his country. It was precisely to prevent this type of disadvantage to returning veterans that Congress enacted the veterans' reemployment rights provisions. See 38 U.S.C. 2021(b)(2).

[23] Respondent's intention that SUB credits not accrue to employees in military service, which is clearly expressed in Section 7.2 of the SUB plan (A. 29), thus has no effect on the veterans' rights that are guaranteed by Congress. Section 7.2 explicitly recognizes this fact in providing that returning veterans do not receive SUB credits for their time in military service "except as otherwise provided by law" (*ibid.*).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 79-81

In The
Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent Republic Steel Corporation would supplement the Statement contained in Petitioner's Brief in the following respects. The Supplemental Unemployment Benefit Plan ("SUB Plan") involved in this matter provides the method by which the dollar amount of each credit unit is calculated. Generally that method is set out in Section 1 of the Plan (A., 17-19). The factors which determine the dollar value of the benefit which any particular employee might receive include the wage rate of the employee, the number of his or her dependents, the amount of state unemployment compensation paid to the employee, and the amount of money remaining in the Plan.

In addition, the record below includes certain testimonial evidence beyond the basic stipulation of facts. Testimony was offered by a representative of the joint

industry benefits committee and by a representative of the outside firm which provides consulting services to the United Steelworkers of America respecting benefit plans. In general this testimony describes the reasoning behind the formulas utilized in the SUB Plan and the purposes for such Plan. Such purposes were described as an attempt to provide SUB payments in areas in which wages or wage substitutions had traditionally been paid within the steel industry. (Tr., 33, 40-44, 55-56). The record contains no testimony to the contrary and indeed, petitioner called no witnesses at the hearing.

SUMMARY OF ARGUMENT

The salient features of the SUB Plan at issue in this case are as follows. Credit units are earned generally only through work. An employee receives one-half credit unit for each week in which he works. This is true irrespective of the seniority of the employee. The work formula is tied to the undisputed fact that employees in the steel industry generally work at least 32 hours in any week in which they work at all. This is because of the contractual agreements within the industry which require payment of benefits if any employee is required to work less than 32 hours in a week. The evidence in the record on this issue is undisputed.

The maximum number of credit units which can be accumulated through work by any employee is 52. This is true irrespective of the seniority of any employee.

The dollar value of a credit unit which any employee may have accumulated is not a factor of seniority. Rather, such dollar value is determined by the wage rate of the employee which in turn is dependent upon the job classification which he holds, by the number of dependents which the employee has, by the amount of state unemployment compensation which the employee receives, and by the amount of funding remaining in the Plan. Thus it is quite

possible that the dollar value of a credit unit will be higher for a less senior employee than for a more senior employee.

Indeed, the relationship between the SUB Plan and seniority is essentially a negative one. The purpose of the Plan is to provide temporary wage supplementation in the event of layoff. Generally, layoff impacts on less senior employees who are thus more likely to utilize the benefit. Moreover, since the amount of funding remaining in the Plan can affect the dollar value of a credit unit, it is quite possible that the dollar value will be lessened as more senior employees are laid off since the amount of money in the Plan will have lessened due to previous payments to less senior employees.

Given these attributes, the SUB Plan at issue here should be enforced precisely as it was written following extensive collective bargaining. Nothing in 38 U.S.C. 2021 requires otherwise. Under the principles articulated most recently by this Court in the cases of *Foster v. Dravo Corp.*, 420 U. S. 92 (1975) and *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), the Plan is entirely consistent with the law. The benefit at issue is conditioned upon an undisputed bona fide work requirement and the nature of the benefit is temporary wage supplementation as earned through actual work. The decisions of the lower courts in this matter should be affirmed.

ARGUMENT

THE TERMS OF THE SUB PLAN HAVE BEEN CORRECTLY APPLIED IN THIS MATTER

It is clear in this matter that the SUB Plan has been correctly applied according to its express terms. The Plan provides that a returning veteran be given continuous service credit for the time he spent in the military. The Plan also provides that no credit units are accumulated by such veteran during the time which he is not in the employ of Republic Steel.

The basic provisions of the Plan relevant to the above are these. An employee is eligible to receive benefits only if he has two years of continuous service. A returning veteran is given continuous service credit for his time in the military and thus his basic eligibility to receive benefits is not impacted by this time away from the employ of Republic.

The number of credit units accumulated by an employee, however, is a function of the number of weeks in which he has worked.[1] The returning veteran does not accumulate credit units for his time in the military since he has not worked for Republic Steel during that time. Petitioner concedes that he has been treated as required under the terms of the Plan. His challenge is limited solely to the enforceability of the Plan according to its terms.

THE PROVISIONS OF THE SUB PLAN ARE NOT IN VIOLATION OF 38 U.S.C. 2021

In interpreting the statutory language describing the rights to which returning veterans are entitled, this Court has focused upon two principles. The Court has made it clear that the returning veteran is entitled to those benefits which by their real nature are perquisites of seniority. The Court has also made it clear that the returning veteran is not entitled to benefits which are tied to a bona fide work requirement and which are in the nature of compensation for services rendered. *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) and *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977).

1. There are certain other situations in which credit units can be earned which are set forth in Section 2 of the Plan (A., 19). Generally these involve hours for which pay is received such as jury duty, vacation, union duties, or time on disability. These exceptions to the normal work requirement are much the same as the exceptions to the normal work requirement contained in the Dravo bargaining agreement which was before the Court in *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

Given those two guiding principles, it is important to analyze the precise nature of the SUB benefit, the precise operation of the SUB Plan, and the purposes behind the operation of the SUB Plan. To begin with, SUB credit units are earned generally only through work. Certainly the bona fide nature of the work requirement is not in question here. The record testimony relative to this issue was not disputed by the petitioner below.

In that testimony, Mr. James Carney, a member of the joint industry benefits committee, explained that SUB credits were earned in situations in which wages or wage substitutes had traditionally been paid in the industry. He also explained that the decision was made to award one-half credit unit for any week in which hours were worked because it had been determined that a formula dependent upon the actual number of hours worked had been tried and found to be unnecessary. He stated that this was true for several reasons.

In the first place, the steel industry involves an around the clock operation and the practical reality is that an employee does not work just a few hours if he works at all. More importantly, however, Mr. Carney explained that the bargaining agreements in the industry require that an employee be paid for 4 hours if he reports at all in a given day and further require that a benefit be paid for any week in which an employee works at all if he works less than 32 hours in that week. Thus, according to Mr. Carney, it had been found through actual experience that employees generally work at least 32 hours if they work at all in a given week. (Tr. 33, 40-44). This undisputed testimony certainly establishes that the award of a credit unit is tied to a bona fide work requirement and is related to areas in which wages have traditionally been paid.

Certain other features respecting the operation of the SUB Plan are important to note. An employee earns one

half credit unit for any week in which he has hours worked. The maximum number of credit units which he can accumulate is 52. He exhausts a credit unit in each week in which he is paid a SUB benefit. Thus the units are earned in the short term through the work requirement and are exhausted in the short term.

Moreover, the amount of the benefit represented by a credit unit is not a factor of seniority. Rather the amount of benefit is determined by the wage of the employee which of course depends on the job classification which he holds, by the number of dependents which he has, by the amount of state unemployment compensation benefit which he receives, and by the amount of money remaining in the Plan. (A., 17-19). Thus a 15 year employee may receive a lower dollar benefit than a 3 year employee. The dollar amount of the benefit is independent of any seniority factor.*

The salient features of the SUB Plan, then, are as follows. The earning of credit units is tied to a bona fide work requirement. Seniority is not a factor. A 15 year employee earns one half credit unit for each week in which he has hours worked; so too does a 3 year employee. A 15 year employee can accumulate no more than 52 total credit units; the same is true with a 3 year employee. The dollar amount of benefit represented by each credit unit will be calculated wholly independent of the number of years of seniority which the employee has.

Given these attributes of the SUB Plan, the law does not require that the Plan be invalidated. In *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), this Court considered a bargaining agreement which conditioned vacation eligibility upon work in 25 weeks during the year. The Court

* The wage rate of the employee is determined by the job classification which he holds. That rate is set for each job classification, irrespective of the seniority of the particular employee who may hold that job classification.

found such work requirement to be bona fide. Certainly the evidence in this matter demonstrates the bona fide nature of the work requirement herein. Moreover, the Court noted in that case that "Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation." *Id.*, at 99.

This Court then expanded upon the appropriate analysis in its decision in *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). The Court there indicated that the insertion of a work requirement could not alter the nature of a benefit if it was in fact a seniority benefit. The Court found that pension eligibility and entitlement was such a seniority benefit given the traditional conception of pension benefits as rewards for length of service. The Court noted that the "most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee." *Id.*, at 593. The Court further noted that the payment formulas were dependent upon earnings at the time of retirement. *Id.*, at 594.

The SUB Plan at issue in the instant case involves a benefit which is more akin to the vacation pay at issue in *Foster v. Dravo* than to the pension rights at issue in *Alabama Power Co. v. Davis.*[2] Certainly there is no lengthy vesting requirement respecting the SUB Plan at issue here. The amount of the benefit is not dependent upon years of service, nor is it dependent upon earnings at the time of retirement. Indeed it is quite possible that the amount of benefit will be higher for a much less senior employee.

In fact, the relationship of the SUB Plan to seniority is essentially a negative one, both in terms of the likelihood

[2] This has long been recognized within the steel industry. The 1969 Pension Agreement for the steel industry was marked as Joint Exhibit 3 in the trial court. Such agreement provided even then that the returning veteran would receive service credit for his time in the military as it affected his pension rights. This was long before the *Alabama Power* decision of course.

of utilizing the benefit and in terms of the amount of the benefit. Seniority is of course a very relevant factor in determining order of lay-off should any lay-off become necessary. Thus the least senior people are the ones most likely to utilize the benefit.

In addition, the total amount of money contributed to fund the Plan is a finite sum. The amount of any benefit paid under the Plan is, *inter alia*, dependent upon the amount of money remaining in the Plan. Thus, as a lay-off becomes more extensive and impacts on more senior employees, the amount of money in the Plan becomes less due to previous payments made to less senior people. As a result, the amount of the benefit may be smaller when it is utilized by more senior employees. This is hardly indicative of a benefit which should be labeled as a perquisite of seniority.

It is apparent when both the purpose and actual operation of the SUB Plan are analyzed that the Plan is not violative of 38 U.S.C. 2021. The SUB Plan provides a short term benefit which is earned in the short term and exhausted in the short term. The accrual of credit units is conditioned upon a bona fide work requirement, the nature of which is undisputed in the record. The amount of the benefit and the total number of credit units available are not dependent upon seniority. The purpose of the benefit is to assist in providing a wage substitute in periods when work is unavailable. Nothing in the statute, or in the case law interpreting the statute, requires that the Plan be implemented in any fashion other than in the express fashion which was agreed to as a result of the collective bargaining process.

THE ARGUMENTS ADVANCED BY PETITIONER DO NOT REQUIRE A DIFFERENT RESULT

In arguing that the Plan is not in accord with the law, petitioner relies upon the decision of the Court of Appeals for the Third Circuit in *Hoffman v. Bethlehem Steel Corp.*,

477 F.2d 860 (3rd Cir. 1973). It is true that such case does involve the SUB Plan in the steel industry and that it reaches a result which is not in accord with the result reached by the lower courts in the instant case. It is also true, however, that the decision in that case was rendered prior to the decisions of this Court in either *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) or *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977).

When the decision of the Third Circuit is analyzed, it is apparent that the principal focus of the court was on the "bizarre result" analysis mentioned by this Court in its decision in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). The significance of that test, however, was explicated by this Court in its decision in *Foster v. Dravo Corp., supra*. This Court therein indicated that the theoretical possibility that vacation entitlement could be achieved by working one hour per week in 25 separate weeks did not render an otherwise bona fide work requirement invalid.

The Third Circuit did not have the benefit of this Court's analysis in *Foster v. Dravo Corp.*,[3] *supra*, when it decided *Hoffman, supra*. Thus when the Third Circuit decided *Hoffman v. Bethlehem Steel, supra*, it applied a test which is not the appropriate test to be applied.

Moreover, the evidence in this case makes it very clear that the bizarre result analysis was not only conceptually inappropriate but factually incorrect. The testimony of Mr. Carney below as to the practical realities of actual work practices within the industry was undisputed. He pointed out that in fact the work formula was adopted after prior use of a formula which correlated more precisely to the number of hours worked. That formula was abandoned because it was found to be unnecessary. It was

3. It is true that *Foster v. Dravo Corp.* came to this Court from the Third Circuit but this Court's opinion was not rendered until 1975.

found to be unnecessary because the contractual requirements in the steel industry are such that an employee normally works at least 32 hours in any week in which the employee works at all. This evidence is undisputed in this case. Thus the analysis made by the Third Circuit in its decision in *Hoffman v. Bethlehem Steel, supra,* is faulty and it was the lower courts in the instant case which reached the proper decision.

Petitioner relies on one other appellate decision respecting a SUB Plan, i.e., *Akers v. General Motors Corp.*, 501 F.2d 1042 (7th Cir. 1974). That decision does not involve the Plan in the steel industry. Moreover, the court there found that the Plan it was examining did not condition the accrual of SUB credits on actual work. *Id.*, at 1045. That decision is thus not relevant in the instant case.

Petitioner argues that SUB payments are really analagous to severance payments. But that is not the case. Generally, severance payments are directly related to years of service, both as respects eligibility and as respects the amount of the benefit. Certainly that was key to the decision of this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). As shown above, that is manifestly not the case with the SUB Plan at issue here. Moreover, severance payments generally are thought to be a final payment for a permanent cessation of employment and thus are somewhat akin to a reward for total service. Conversely, SUB payments are generally temporary in nature, designed to cushion against temporary dislocations which generally impact on employees with lesser seniority.

Petitioner argues that the two year eligibility requirement for SUB payments is indicative of a seniority benefit. But two things must be remembered. The two year eligibility requirement is for payment of benefits. Accrual of credit units begins immediately in the first week in which an employee works. The two year period respects only the payment of benefits. Thus no time actually worked is irrelevant as respects the earning of credit units.

Moreover, it should also be remembered that the returning veteran is credited with the time spent in the military service for purposes of calculating his continuous service. Thus, for purposes of payment eligibility, time in the military is counted. It is only the accrual of credit units which does not occur unless actual work takes place.

It is apparent that resolution of this case is dependent upon an analysis of the SUB Plan here at issue, an understanding of the purpose and operation of that Plan, and an application of the principles articulated most recently by this Court in the cases of *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) and *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). Despite this, the Court may be interested in the analysis of certain other lower courts.

For example, in *Gentile v. U.S. Trucking Corporation,* 355 F. Supp. 960 (S.D.N.Y. 1973), *aff'd,* 489 F.2d 752 (2d Cir. 1974), the courts considered the rights of a returning reservist to certain welfare and insurance benefits. The courts found that the benefits were conditioned upon bona fide work requirements and noted that the amount of benefit payable for each credit earned was the same for all employees, whatever their seniority.

In *Kasmeier v. Chicago, Rock Island and Pacific R. Co.*, 437 F.2d 151 (10th Cir. 1971), the court considered a case involving vacation benefits. The court analyzed the issues in a fashion consistent with the subsequent decision of this Court in *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). The court noted that the applicable statute did not require discrimination in benefits which granted preference to returning veterans. See also *Bradley v. General Motors Corporation,* 283 F. Supp. 481 (E.D. Mo. 1968).

Finally, in analyzing the issues in the instant case, it is important to keep in mind what the statute in question is seeking to accomplish. In general terms, it seeks to protect the veteran as respects those things which he can never recover if he loses them as a result of his military service.

Thus, e.g., if the veteran loses 2 or 3 years from his pension credit, he can never recover those years.

On the other hand, the veteran does not lose such things as sick pay, medical insurance, and vacation entitlement. During his time in the military, he has such benefits provided to him while in that employment. When he returns to civilian employment he has such benefits there too.

The situation as respects SUB payments is much more akin to the latter type benefits than to pension benefits. One uncertainty which the veteran does not face during his years in the military is the threat of lay-off. When he returns to civilian employment, he immediately again begins to accrue SUB credit units to be utilized should he ever need them. It is not necessary to require that he accumulate other credit units which he can hold in the bank during a period of time in which he is free from the threat of lay-off.

CONCLUSION

The trial court below wrote two very detailed opinions as to why the SUB Plan at issue here was fully in accord with the law. The court correctly analyzed the issues under the controlling precedents of this Court and based upon the undisputed evidentiary facts in the record. The decision of the trial court was quite properly affirmed by the Court of Appeals below. Respondent asks that the decisions of the lower courts be affirmed.

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